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**LAW FOR PRINTERS  
AND PUBLISHERS**





# LAW FOR PRINTERS AND PUBLISHERS

His Honour BRETT CLOUTMAN

*V.C., K.C., one of the Official Referees  
of the Supreme Court of Judicature*

AND

FRANCIS W. LUCK

*Solicitor of the Supreme Court*

SECOND EDITION

*Edited by*

E. H. HALE

*Late Legal Secretary to the British Federation of Master Printers*



S T A P L E S   P R E S S

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## PREFACE TO SECOND EDITION

IN THE nineteen years since the first edition was published there have been substantial changes in statutory law that in themselves have made it necessary that a new edition should be brought out. That necessity has provided the opportunity for expansion of some subjects to meet the demand by printers for advice on these as shown by their requests for advice by the editor over the past fifteen years, and also the introduction of some new matter.

The chief legislative changes have been in relation to factories, to the replacement of workmen's compensation by national insurance, and to certain aspects of the law relating to industrial injuries. The factory law has been shown, section by section, in a form easily assimilable (so far as it concerns printers and publishers) instead of by giving a complete copy of the current Act as was done in the original edition, and all relevant Statutory Orders have been dealt with, a few of them being given complete in an Appendix.

Another statutory change that touches many printers and publishers closely is that relating to lotteries and competitions. This has been dealt with fully.

An impending change of great importance is in relation to Copyright in Design and this is dealt with.

As part of the recasting of the book a change has been made which the editor feels is now desirable in regard to its order. The original edition, as explained in the preface to the first edition, was a combination of two parts, one of which had previously been published separately and was intended more particularly for authors and publishers. The other part catered for 'printers and publishers'. The subjects dealt with throughout can be said to concern all three interests, though mainly those of printers, and the rearrangement of chapters and headings will, it is hoped, make for easier reading.

In using the book in practice the editor has felt that the form adopted by the learned joint authors, particularly as to the many and easily found sub-headings, was a sound one for their purpose which was to help printers and publishers as a main intention but also to be of considerable assistance to their legal advisers.

It seems fitting to explain that the editor was asked to undertake this new edition because neither of the joint authors was available, Mr. Luck being no longer alive and Mr. Cloutman, as a rising King's Counsel, being too busy.

E. H. HALE,  
*Editor.*

*November, 1948.*



## PREFACE TO FIRST EDITION

IN SELECTING the branches of law to be outlined for the use of the printing trade, the principle which has guided the authors has been to deal in the main with those sections in which questions have continually been raised by printers within their practical experience.

The result is no doubt that some of the material included may seem to the legal mind unnecessary in a book the scope of which is professedly restricted, but the authors have felt that in this matter the practical test is more important than technical considerations.

The first part of this book was separately published a short time ago as *The Law Relating to Authors and Publishers*, and the matters there treated, publishing agreements, copyright, libel, and illegal publications, are equally the concern of the printing trade.

The second part is devoted to the internal problems of a printing works, such as problems relating to printing contracts, with special reference to the submission of proofs, printing errors, lien over blocks and manuscript and the customs of the trade, problems relating to the law of nuisance from noisy machinery, to accidents in printing works, and to the law of master and servant.

To avoid litigation is a first principle of sound business, and if by pointing out some of the pitfalls which beset the unwary some potential lawsuits may be avoided, the authors will be more than rewarded for their work.

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June, 1929.



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## CHAPTER ONE

### CONTRACTS OF PRINTERS AND PUBLISHERS

#### GENERAL

It is difficult to deal with this subject without a general survey of the Law of Contract and this clearly cannot be attempted in a volume of the present scope.

The plan adopted instead is to deal on broad lines with the question of the 'formation of contracts', and then to select particular points that have led to litigation.

#### FORMATION OF CONTRACT

The law requires certain contracts to be embodied in the form of deeds, others must be written, while in the vast majority of cases a clear and unqualified verbal agreement consisting of an offer and an acceptance may be enforced; provided the agreement is supported by 'consideration' of some kind, the parties are fully capable of contracting, and their object is entirely lawful.

#### DEEDS

A deed is rarely needed for a commercial contract, but it may be observed that it has this important effect in law. Whereas a gratuitous promise (i.e. an agreement unsupported by legal consideration) is not ordinarily enforceable, yet if it is embodied in a deed, and made 'under seal', the law will no longer inquire into the consideration, but will give the force of a binding obligation to the gratuitous promise.

#### STATUTES OF LIMITATION

The other principal characteristic of a contract by deed (or an agreement made under seal) is that an action arising from such a contract may be brought at any time within twelve years from when the cause of action first existed; and this period may be prolonged, and reckoned afresh from the date of any written acknowledgment of a debt or part payment of the sum due.

Where on the other hand the debt arose from an ordinary contract, whether written or verbal, the right of action is barred if not exercised within six years; and here again the right of action may be revived by acknowledgment.

Again an agent with authority to execute deeds can only be appointed by deed; while in certain other special cases such as transfers of British ships, and leases of lands for over three years, deeds are essential in every case by statutory requirement.



**AGREEMENTS THAT MUST BE STAMPED**

As considerable uncertainty arises at times concerning the necessity of stamping contracts and agreements, especially when these are contained in ordinary correspondence, it may be of value to state the more important statutory provisions.

The consolidating Act in force on the point is the Stamp Act, 1891, and certain of the later Finance Acts have contained amendments. The first schedule of the Act contains the following:

‘There is a stamp duty of sixpence upon every agreement or memorandum of an agreement made in England under hand only (i.e. not under seal) and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument.’

**EXEMPTIONS**

The following are exempted from the operation of the rule:

(1) Agreement or memorandum the matter whereof is not of the value of £5.

(It will not be enough to state that the value was unascertainable at the time; to come within the exemption the subject-matter must be shown affirmatively to be less than £5.)

(2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer or menial servant.

(An overseer in a printing office has been ruled an artificer.<sup>1</sup>)

(3) Agreement letter or memorandum made for or relating to the sale of goods.

(Hire-purchase agreements are not included in this exemption.)

There are a number of special statutory exemptions in addition, which it is not within the scope of the present work to detail.

In the case of many important instruments such as bonds, covenants, conveyances, leases and mortgages there are substantial duties to be paid, calculated on the value of the subject-matter, but again it is unnecessary to discuss these here, since such instruments may only be prepared by competent legal persons; and the Act itself provides a £50 penalty for unqualified persons preparing instruments relating to real or personal estate, &c.

**ENFORCING UNSTAMPED AGREEMENTS**

The principal difficulty which is likely to arise from the neglect of stamping an agreement, is in respect of later disputes and litigation.

The Stamp Act provides<sup>2</sup> that upon production of an instrument chargeable with duty as evidence in any Court, the judge is to take notice of any omission or insufficiency of stamping. If the instrument

<sup>1</sup> *Bishop v. Letts* (1858), 1 F. & F. 401.

<sup>2</sup> Stamp Act, 1891, Section 14.

is one which may be legally stamped after execution, it may then be stamped on payment of the duty, a penalty of £10, and a further sum of £1; then and only then it may be received as evidence.

In the case of conveyances, &c., there may be a further penalty equivalent to the unpaid stamp duty, but reference must be made to the Act itself for details of the particular offences and the pains and penalties incurred. The Commissioners of Inland Revenue have wide powers of mitigation and remission of penalties in proper cases.

#### PRINTING CONTRACTS

In this connection, a point of practical importance arises, hinging on this question: Is a printing contract in the eye of the law a contract for the 'sale of goods', or is it a contract of 'work and labour'?

If the former, then it is unenforceable in many cases without written evidence under the Sale of Goods Act (see pages 5 and 20).

If the latter, writing is not necessary, and oral evidence would suffice, but *if there is* a written agreement it must be stamped.

The question is a most thorny one, and far from being conclusively settled for all purposes. The position is probably this: in all ordinary cases printing contracts are regarded as contracts for the sale of 'future goods'; but there is an important High Court decision of ninety years' standing that they are contracts of 'work and labour', and in the case of need it is always open to the printer who has accepted an order without any written evidence to rely upon that decision.<sup>1 2</sup>

The implications of this curious position are discussed fully on pages 20-24.

#### WRITING

Written evidence of the existence of a contract is required by law in a large number of cases. An example of this which is of particular importance to authors will be considered in a later chapter, namely, that every assignment of copyright under the Copyright Act, 1911, must be in writing.<sup>3</sup> There are a number of other special cases, but there are also two cases of general importance which must be closely considered and permanently borne in mind; these are under the Statute of Frauds and the Sale of Goods Act respectively.

#### STATUTE OF FRAUDS

The first arises under an old statute of Charles II, viz. Section 4 of the famous Statute of Frauds, 1677. This Act lays down five sorts of contracts which are unenforceable without written evidence. These are: a promise by an executor to pay damages out of his own estate,

<sup>1</sup> *Clay v. Yates* (1856), 25 L.J.Ex. 237.

<sup>2</sup> *Lee v. Griffin* (1861), 30 L.J.Q.B. 254.

<sup>3</sup> Section 5 (2), see page 302.

a promise of guarantee, an agreement made in consideration of marriage (other than the actual promise of marriage), contracts for the sale of land, and, finally, and most important of all, agreements not to be performed within one year from the date when they were made.

Contracts that are absolutely indefinite as to date (e.g. for maintenance of a separated wife) are not within the statute, but contracts for a definite period which extends beyond the year must be in writing, although they might be determined by notice earlier.

The following case is one where the statute necessarily applies, although it is not entirely free from difficulty. A journalist is taken on the staff of a periodical, with a condition that on leaving this service he shall not accept employment in the same capacity and in the same town for two years.<sup>1</sup> This condition brings the contract within the Act, and makes it unenforceable if it is entirely oral.

#### FORM OF CONTRACT

Any written memorandum signed by the party who is being sued, or by his agent, will suffice provided the names of the parties and the terms of the contract appear, including the consideration. As the writing is only required as *evidence* of the contract, it does not matter if the memorandum is altogether later in date than the agreement itself; and a document *repudiating* liability under the contract may furnish the evidence required provided it embodies the necessary particulars. Thus if a letter is sent to a newly-engaged member of staff, saying that his conduct is so unsatisfactory that remuneration at a stated rate for the intended term of three years cannot continue, and that the employee may either terminate his service or accept different conditions, would probably be sufficient evidence to enable the employee to sue on the original contract of service.

Again the memorandum may be contained in two or more documents, provided they are connected and obviously refer to one another; but any verbal explanation or addition will not be allowed. Thus where a letter omitted the name of the person to whom it was addressed, the envelope in which it had been sent was allowed as evidence, in order to complete the memorandum.<sup>2</sup>

In another leading case a bookseller wished to obtain subscribers for a proposed illustrated edition of Shakespeare.<sup>3</sup> He issued prospectuses with all particulars and at the same time kept a book in his shop for the signature of intending subscribers. It was held that there was nothing to connect the book with the prospectus, and that no verbal explanation could be accepted for the purpose. The rule is not as strictly applied now as formerly and it is possible that a different decision would be

<sup>1</sup> *Reeve v. Jennings*, [1910] 2 K.B. 522.

<sup>2</sup> *Pearce v. Gardner*, [1897] 1 Q.B. 688.

<sup>3</sup> *Boydell v. Drummond* (1809), 11 East 142.

given to-day on the facts stated; but it is certain that if (as in this case) further evidence as to the *extent* of the defendant's liability was sought to be introduced the court would unhesitatingly reject it.

#### CONTRACTS OF GUARANTEE

Amongst the specified cases of contracts which are unenforceable without written evidence was mentioned a 'promise of guarantee'. The Statute reads: 'Any promise to answer the debt default or mis-carriage of another person'; and one or two points in reference to this clause should particularly be noted, as confusion sometimes arises between an 'indemnity' and a 'guarantee'.

An indemnity is an undertaking between two parties, e.g. an author and a publisher or between a publisher and a printer.

A guarantee implies three parties, e.g. a banker who guarantees to the author that certain payments will be made when due from the publisher.

A promise of an *indemnity* is distinguishable from a *guarantee*, and such a promise needs no writing. The leading case on the subject illustrates the difference neatly. A series of bills of exchange drawn on a firm of shippers had been accepted by the plaintiff, on the defendant's written *guarantee* that if called upon to do so he himself would meet the bills as and when they fell due.

Here there were three active parties, and the case was one of ordinary guarantee. But at a later stage the firm of shippers were regarded as so very 'doubtful' that this was not enough, and the defendants then said that if the plaintiff would accept the bills they would 'see that funds were provided'. The firm of shippers now became a mere figure-head, and the contract between the other parties was one of indemnity, and no writing was needed.<sup>1</sup>

Similarly in any contract of sale, if the person giving the promise really makes himself primarily answerable, and the seller looks to him first, and never expects payment from the person who received the goods, it is an indemnity and not a guarantee, and writing is not essential.

In cases of guarantee the consideration need not appear,<sup>2</sup> in contrast to the other four cases, in which it is essential.

#### SALE OF GOODS ACT, 1893

Amongst many other important provisions, this Act reproduces another section of the Statute of Frauds, which is dealt with under 'Printers' Contracts'.<sup>3</sup> The gist of this section is: that to enforce contracts to sell goods of a value of £10 or over, there must be written evidence, unless the contract has been recognised in some other way, as by acceptance of the goods or part payment.

<sup>1</sup> *Guild v. Conrad*, [1894] 2 Q.B. 884.

<sup>2</sup> Mercantile Law Amendment Act, 1856, Section 3.

<sup>3</sup> See page 20.

## CHAPTER TWO

### CONTRACTS BETWEEN PUBLISHERS AND AUTHORS

#### I. ASSIGNMENTS OF COPYRIGHT

##### AUTHORS' ASSIGNMENTS

Having thus briefly considered the most important cases in which the law requires written evidence of contracts, it is proposed to deal with certain special matters arising in reference to authors' contracts, adding a short statement of the general law wherever this is necessary to explain the particular application.

##### ASSIGNABILITY

Assignments of contract are permitted by law in certain cases. The question falls under two heads: (a) the rights and benefit under the contract (e.g. the right to recover repayment of debt, which may be assigned under statutory provision, enabling the assignee to sue the original debtor in his own name<sup>1</sup>); (b) the liability under a contract (e.g. a promise to carry out particular work), and considerably greater difficulties arise here than in the former case.

With regard to this the general law precludes the assignment of an undertaking to do work for which a party was selected on his *personal qualifications*; and clearly it would be in the highest degree unsatisfactory to allow an author for example to assign his duties without the full knowledge and consent<sup>2</sup> of the other contracting party.

If the author die, any incomplete contract is discharged and his executors are free from liability.<sup>3</sup> This is perhaps obvious; but what is the position where the author is made a bankrupt? It has been decided that here, too, his assignees in bankruptcy have no power either to make him complete his contract or to undertake it themselves.<sup>4</sup>

##### SIR WALTER SCOTT'S PUBLISHERS

In the last quoted case the whole effect of bankruptcy on the part of either author or publisher was carefully considered. This case was decided in 1841, and the discussion in Court centred on difficulties which had arisen between the late Sir Walter Scott and his booksellers who had become bankrupt.

Baron Abinger expressed himself as follows: 'Sir Walter Scott had engaged to write a novel, which they were to have the benefit of

<sup>1</sup> Law of Property Act, 1925, Section 136.

<sup>2</sup> *Robson v. Drummond* (1831), 2 B. & Ad. 303.

<sup>3</sup> *Marshall v. Broadhurst* (1831), 9 L.J. (O.S.) Ex. 105.

<sup>4</sup> *Gibson v. Carruthers* (1841), 8 M. & W. 321.

publishing and in consideration of which they were to pay him £4,000, for which sum they had accepted bills drawn by him upon them in anticipation. Before the work was finished they became bankrupt, whereupon Sir Walter Scott took up all the bills which he had negotiated.

'Upon the conclusion of his work, and when it was ready for the press, the assignees in bankruptcy of the booksellers contended that by virtue of the contract they had a right to the profit of publication, which they were ready to undertake. Sir Walter suggested several grounds to show that the credit, the skill, the judgment, integrity and personal character and reputation of a publisher were matters of great importance to an author, on which the success and reputation of his own works might greatly depend, and therefore insisted that since a part of the consideration for his contract lay in the personal credit and qualities of the booksellers, he was by their bankruptcy discharged from the contract.

'I must own', added the judge, 'that his reasoning appeared satisfactory to me; but a more obvious illustration of the principle upon which it rested would have been afforded by reversing the case, and supposing that Sir Walter Scott had been the bankrupt and his booksellers solvent, would they have been content to pay their £4,000, and take the risk of publishing a novel written by the assignees of the novelist?'

A full consideration of the law underlying these statements makes it almost unnecessary to add that it makes no difference if the publisher is a limited company,<sup>1</sup> since the contract is a personal one and cannot be assigned on either side. Conversely, if it is clear that if no personal qualifications arise, as in the printing of handbills, there can be no objection if the printer gets the work done by a sub-contractor. But the printer will still be liable for bad work, and he alone can sue for payment.<sup>2</sup>

#### CHEQUES AS ASSIGNMENTS OF COPYRIGHT

Assignments of copyright are considered in some detail in a later chapter. These may take different forms according to the requirements and experience of the parties. Thus in many cases publishers or newspaper proprietors will use specially prepared cheques for paying authors and journalists. These cheques carry a printed endorsement which purports to be the assignment when completed by the author's signature. This may pass 'World-rights' or 'United Kingdom rights' or 'All Serial Rights'.

Curiously enough, it does not appear that the latter term has ever been legally construed. On the face of it, an assignment of serial rights

<sup>1</sup> *Griffith v. Tower Publishing Co.*, [1897] 1 Ch. 21.

<sup>2</sup> *British Wagon Co. v. Lea* (1890), 5 Q.B.D. 149.

passes only the rights to publish short contributions in their existing form, and long contributions in a series of comparatively short parts. This then may be held to reserve to the author the right of 'volume publication', whether of a large number of short contributions, or of a story in book form, and therefore it is not an assignment of copyright. This point was made in the case of *Re Jude's Musical Compositions*, where volume rights only had been sold.<sup>1</sup>

#### CONTRACTS OF SERVICE AND VOLUME RIGHTS

Where an author is under a contract of service the copyright in work so produced vests automatically in his employer by Section 5 of the Copyright Act, 1911,<sup>2</sup> but subject to the following saving clause:

'Where the work is an article or other contribution there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain publication, otherwise than as part of a newspaper, magazine or similar periodical.'

In other words 'volume rights' for collected works are excluded from the employer's copyright, although the 'serial rights' pass without any assignment. Yet the *author* cannot exercise the volume rights because the copyright is not in him, but merely a right to restrain; and thus it would appear that until a special agreement is arrived at these rights are in suspense and cannot be exercised by anyone.

#### RECEIPTS AS ASSIGNMENTS

In general it may be said that a signed receipt forms a sufficient memorandum of assignment to satisfy the Copyright Act. Thus: 'Received of Messrs. — the sum of £2 6s. 6d. for five original card designs inclusive of all copyrights; subjects: four golfing subjects, one Teddy Bear painting (signed).'<sup>3</sup> But in every case it must be possible to identify the subject-matter with sufficient accuracy.

It is, of course, open to every author who is satisfied that his standing warrants such a course, to alter his publisher's endorsement of cheques to suit his own views, even in spite of the fact that some of his publishers in their turn will mark their endorsements 'not to be altered'.

#### SYNDICATION

A further difficulty for authors arises in respect of what is known as 'syndication'. The amalgamation of commercial interests on a large scale is one of the most important features of modern industrial development. This applies as much to the proprietorship of newspapers,

<sup>1</sup> *Re Jude's Musical Compositions*, [1907] 1 Ch. 651.

<sup>2</sup> See page 302.

<sup>3</sup> *Savoury v. World of Golf*, [1914] 2 Ch. 566.

periodicals, and other publishing concerns, as to any other body of commercial interests, and directly affects authors in the following manner.

A contribution is offered to, and accepted by, the editorial department of a London newspaper. In due course the author receives his cheque signed on behalf of an amalgamated concern, and will not be surprised to find that his work, which he intended for publication in one paper, and which was paid for on that scale, appears at intervals in three or four other publications in various parts of the country. Unless the author can show that he was deliberately deceived he appears to be without a remedy.

#### UNAUTHORISED ALTERATIONS

Although an author has assigned his copyright in a certain work there is at least one important right which he retains. This is that his work shall not be materially altered without his consent.<sup>1</sup> The right is based upon a Common Law principle discussed in a later chapter, that every man has a right to insist that work shall not be 'passed off' under his name when in fact it is substantially different from what he originally produced.

In the leading case on the point it was said<sup>2</sup> that although a publisher might own the copyright, the author would still have his action for injury to his reputation if his work were inaccurately published, and thus a false representation as to authorship were publicly made.

No doubt, however, this point should be taken subject to considerable reserve. If the work of an unknown journalist is altered and published without the author's name it will be difficult for him to show any right of action at all, since if he is not publicly known it cannot be said that his reputation has been injured.

The application of the principle is seen in the difficulties which have from time to time been placed in the way of the producers of wireless entertainments in respect of the curtailment of plays and other work which becomes necessary in preparing timed programmes.

Some publicity has recently been given to at least one such case and the authors are indebted to the courtesy of the Copyright Department of the now defunct British Broadcasting Company for information on the subject.

It appears that a playwright of standing was able effectively to prevent his work being 'cut' to fit the schedule of times allotted, in spite of his previous assignment of 'broadcasting rights'; and in view of the impossible position created, the company were forced to insert a general stipulation in their contracts that these curtailments shall not be objected to.

<sup>1</sup> *Preston v. Raphael Tuck*, [1926] 1 Ch. 667, pages 42, 75 and 89, *post*.

<sup>2</sup> *Archbold v. Sweet* (1832), 5 Car. & P. 219.



## PUBLISHER'S AGREEMENTS

The law as to assignments of copyright requires that any such assignment shall be specific and shall be made in writing. The exceptional case of an 'equitable' as opposed to a 'legal' assignment only arises where the assignee is in a position immediately to enforce the written assignment as a contractual right.<sup>1</sup>

Accordingly, it has been held<sup>2</sup> that where the proprietor of the copyright in a series of musical publications called 'Music and the Higher Life' assigned 'the sole and exclusive rights' of printing and publishing 'the series in *volume form* only, in consideration of the publishers bearing all the expenses and paying a royalty of sixpence on every copy sold', this was an agreement to publish, and not an 'assignment of copyright'. This distinction is of vital importance to the author, since it implies that on breach or termination of the agreement he may reclaim his full rights, and also at all times he retains his 'serial rights'.

## LIEN ON COPYRIGHT

A decision of Mr. Justice McCardie's upon an author's rights in respect of his deed of assignment of copyright, where the publisher subsequently sold their business, is also worth close consideration.<sup>3</sup>

The author had assigned an exclusive right of publication, and made the publishers sole owners of the copyright. The company made an allotment of shares in part payment and covenanted to pay royalties and further that they would not dispose of the copyright except subject to the terms of that agreement.

Some time later the company disposed of their business including the copyright in the book 'so far only as the vendors had any right to sell', and 'subject to all equitable or other claims thereon'. The purchaser having acquired the business denied that he was liable to pay the royalties reserved by the original deed.

Two important points at least are illustrated here. The first is that no one can be sued on a contract unless he is a party thereto. For instance, it often happens that a manufacturer sells to a retailer with a condition that the goods are not to be resold under a fixed minimum; then if the retailer sells to a purchaser with notice of this condition, and the purchaser in his turn makes a third contract of sale at a cut price and deliberately ignores the manufacturer's condition, the manufacturer has no remedy. The reason is that there was no contract between the manufacturer and the *second* purchaser.<sup>4</sup> The retailer on the other hand had privity of contract with the offender and could sue

<sup>1</sup> See page 101, *post*, footnote 9.

<sup>2</sup> *Re Jude's Musical Compositions*, [1907] 1 Ch. 651.

<sup>3</sup> *Barker v. Stickney*, [1918] 2 K.B. 356; *Barker v. Stickney*, [1919] 1 K.B. 121.

<sup>4</sup> *Dunlop v. Selfridge*, [1915] A.C. 847.

if he wished to do so. So here on the same principle the author could not enforce his rights under the original deed, against the successor in business of the publishers.

The second important contention was that in the circumstances the author had a lien, or charge upon the copyright, for payment of the agreed royalties. The learned judge said that this point had caused him great difficulty, but found ultimately that no such lien could be implied. He said, 'I venture to think that a mere covenant to make a payment out of property will not, without more, make the payments a charge upon the property'; and in another passage, 'No vendor's lien will be created by the mere reservation in the assignment of future royalties, or even by provision as to the obligations of second or later assignees.'

It is possible that if the original deed had not constituted the publishers sole owners of the copyright, and if it had expressed that the royalties were to be paid 'as part of the purchase money' the author's claim would have been upheld.

When the case went to appeal it was strenuously argued that although an unpaid vendor's lien or incumbrance cannot ordinarily attach to goods, as it does to land, yet copyright ought to form an exception because of its special nature. The Lords Justices rejected this view and upheld the judgment of the court below.

#### MORTGAGE OF COPYRIGHT

But although an unpaid vendor's lien cannot attach to copyright it appears that copyright may be made the subject of mortgage. Thus an author can mortgage all his rights in any composition as security for the repayment of a debt, and the rights acquired by the mortgagee will be subject to the author's 'equity of redemption'.<sup>1</sup> It is certainly somewhat anomalous that in one set of circumstances principles which usually relate exclusively to land should be allowed to attach to copyright, and that in other very similar circumstances such principles should be rejected.

<sup>1</sup> *Re Jude's Musical Compositions*, [1907] 1 Ch. 651.

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The author had assigned an exclusive right of publication, and made the publishers sole owners of the copyright. The company made an allotment of shares in part payment and covenanted to pay royalties and further that they would not dispose of the copyright except subject to the terms of that agreement.

Some time later the company disposed of their business including the copyright in the book 'so far only as the vendors had any right to sell', and 'subject to all equitable or other claims thereon'. The purchaser having acquired the business denied that he was liable to pay the royalties reserved by the original deed.

Two important points at least are illustrated here. The first is that no one can be sued on a contract unless he is a party thereto. For instance, it often happens that a manufacturer sells to a retailer with a condition that the goods are not to be resold under a fixed minimum; then if the retailer sells to a purchaser with notice of this condition, and the purchaser in his turn makes a third contract of sale at a cut price and deliberately ignores the manufacturer's condition, the manufacturer has no remedy. The reason is that there was no contract between the manufacturer and the *second* purchaser.<sup>4</sup> The retailer on the other hand had privity of contract with the offender and could sue

<sup>1</sup> See page 101, *post*, footnote 9.

<sup>2</sup> *Re Jude's Musical Compositions*, [1907] 1 Ch. 651.

<sup>3</sup> *Barker v. Stickney*, [1918] 2 K.B. 356; *Barker v. Stickney*, [1919] 1 K.B. 121.

<sup>4</sup> *Dunlop v. Selfridge*, [1915] A.C. 847.

if he wished to do so. So here on the same principle the author could not enforce his rights under the original deed, against the successor in business of the publishers.

The second important contention was that in the circumstances the author had a lien, or charge upon the copyright, for payment of the agreed royalties. The learned judge said that this point had caused him great difficulty, but found ultimately that no such lien could be implied. He said, 'I venture to think that a mere covenant to make a payment out of property will not, without more, make the payments a charge upon the property'; and in another passage, 'No vendor's lien will be created by the mere reservation in the assignment of future royalties, or even by provision as to the obligations of second or later assignees.'

It is possible that if the original deed had not constituted the publishers sole owners of the copyright, and if it had expressed that the royalties were to be paid 'as part of the purchase money' the author's claim would have been upheld.

When the case went to appeal it was strenuously argued that although an unpaid vendor's lien or incumbrance cannot ordinarily attach to goods, as it does to land, yet copyright ought to form an exception because of its special nature. The Lords Justices rejected this view and upheld the judgment of the court below.

#### MORTGAGE OF COPYRIGHT

But although an unpaid vendor's lien cannot attach to copyright it appears that copyright may be made the subject of mortgage. Thus an author can mortgage all his rights in any composition as security for the repayment of a debt, and the rights acquired by the mortgagee will be subject to the author's 'equity of redemption'.<sup>1</sup> It is certainly somewhat anomalous that in one set of circumstances principles which usually relate exclusively to land should be allowed to attach to copyright, and that in other very similar circumstances such principles should be rejected.

<sup>1</sup> *Re Jude's Musical Compositions*, [1907] 1 Ch. 651.

## CHAPTER THREE

### CONTRACTS BETWEEN PUBLISHERS AND AUTHORS

#### II. GENERAL

##### PUBLISHERS' OPTIONS

Closely connected in law with the cases at the end of the previous chapter came another one in 1920. This also concerned rights attaching to an author's work after a breach of covenant.<sup>1</sup> Here an author had entered into a written agreement with the plaintiffs to publish a novel, and by the same agreement he had given them an option to publish his next three books upon certain royalty terms.

Six months later the author entered into another agreement with a second firm of publishers whereby *they* were to publish the next three books he should write *after completion of his agreement* with the plaintiffs.

The author then purported to satisfy the first agreement by sending to the plaintiffs a sociological book, and two collections, one of stories and the other of verses, both of which he had already published. Meanwhile he was writing his second novel, and in due course he sent it to the second publisher, who set up the type and sent proofs to him.

This firm had notice of the prior agreement throughout and were made co-defendants with the author. Their first contention at the trial was that the agreement had been complied with. Needless to say, the judge held that the author had not complied with his obligation to offer 'his next three books', by sending in what he termed 'these relics of his literary efforts of the past'.

The next contention of the defence was that the plaintiffs were endeavouring to obtain specific performance of a contract of personal service, and it is settled law that while the Courts will in proper cases give damages, they will not order the carrying out of a contract which they are powerless to enforce. This, however, it was decided was not a contract of that kind; it was an undertaking to hand over the products of labour for a consideration, and similar in principle (said the judge) to a contract by a farmer to sell a future crop! The author was bound by his undertaking to hand over the manuscript of the novel in dispute to his first publishers, the plaintiffs.

Finally, and this was the real difficulty, the second publishers contended that they were in no way bound by the first agreement to which they were not a party. The judge, however, pointed out that the agreement provided specifically that upon exercising their option, the plaintiffs should have exclusive rights of production, and of suing in respect of infringement of copyright. Thus the plaintiffs *definitely*

<sup>1</sup> *Erskins Macdonald Ltd. v. Eyles*, [1921] 1 Ch. 631.

*owned an option to become entitled to an interest in the copyright, which the law would protect irrespective of other agreements by the author.*

The plaintiffs obtained an injunction restraining publication elsewhere until they should have had the first offer of the new novel and had refused it.

#### STORY SOLD TO TWO PUBLISHERS

The breach of contract which gave rise to the next case was somewhat different. Here the author had agreed to sell the complete copyright in an 80,000-word story to the plaintiffs for £200. The typescript was delivered, and, pending a dispute about the number of words, the publishers withheld a part of the price. Meantime the author sold the volume-rights in the story to another publisher, who bought without notice of the existing agreement.<sup>1</sup>

It was held in the judgment that the agreement constituted a good equitable assignment of copyright (since it gave the plaintiffs a right to compel a legal assignment of the copyright in the story when written) and the plaintiffs were entitled to an injunction against the second publishers.

The case also fell under the provisions for 'authorship under a contract of employment', which it will be seen automatically vest the copyright in the employer. But had their case rested upon employment alone it could not have succeeded, since the work had not been paid for in full at the time. It should also be added that this part of the judgment is based upon a very doubtful application of the principle involved.<sup>2</sup>

#### WORK UNDER EMPLOYMENT

This point when it comes to be directly in issue may easily lead to considerable difficulty. Thus a professional searcher of records was in the habit of taking notes of the records he investigated, and supplying his employers with a transcript.<sup>3</sup> The employer felt, not unnaturally, that as he paid for the work he was entitled to the original notes. He sued for them accordingly but lost his action, it being held that in the absence of any express stipulation, the notes were the property of the searcher.

Again, where a proprietor of an encyclopædia employs and pays an author to compose his articles, the question whether the copyright is in the proprietor or in the author is a question of fact and not of law. No writing nor express words need be used (as in assignment of copy-

<sup>1</sup> *Ward Lock v. Long*, [1906] 2 Ch. 550.

<sup>2</sup> *Crawford v. Paton*, [1911] C.Sess. (Sc.) 1017.

<sup>3</sup> *Vide* the explanation of Copyright Act, 1911, Section 5 (1) (b), *post*, page 100, and the distinction of serial rights from volume rights, *ante*, page 8.

right), but the Court must take all the surrounding circumstances into consideration and draw the proper inference from this evidence.<sup>1</sup>

#### BREACH OF CONTRACT TO PUBLISH IN BOOK FORM

In a 1921 case decided in the Court of Appeal<sup>2</sup>, the position was considered where publishers had agreed to publish a series of articles by a champion runner, and another athlete. These were to appear, and did appear, in the *Badminton Magazine*, but in their contract the publishers had further undertaken to publish the collected articles in book form, paying a royalty of fourpence on each copy of the book sold.

The publishers ultimately refused to publish the book, and the breach of contract being clearly established the difficult question of assessment of damages arose. The defendants paid £25 into Court with a denial of liability, and their counsel argued that the obligation (if any) would have been satisfied by the publication of one single copy. Mr. Justice Sankey, however, thought otherwise and awarded £500 damages, representing an issue of 30,000 copies, each bearing a royalty of fourpence. The Court of Appeal regarded this estimate as excessive, and decided that the defendants were bound only to publish such a number as was reasonable in all the circumstances, but refused to make a calculation based upon the smallest number of copies that could be described as a publication.

They awarded £100 and even this was not without comments on the part of at least one member of the Court, suggesting that the plaintiffs might have received considerably less if the book had actually been published.

#### WARRANTY OF COPYRIGHT

Every publisher who buys copy for publication is necessarily taking a certain risk, and the fact that he has received proper assurances by no means protects him from an action for infringement of copyright; although no doubt he in turn can base an action for damages on such assurance.

This point was illustrated years ago in a purported sale of one of Captain Marryat's novels after the author's death.<sup>3</sup> It appeared in evidence that a sum of £50 was paid, and the receipt was in these terms: 'For permission to publish Captain Marryat's work *Monsieur Violet* so long as the copyright may endure, that right to be in any case exclusively the publisher's for ten years'. This receipt was held to constitute an express warranty of copyright on the part of the defendant who was the deceased author's heir-at-law.

<sup>1</sup> *Lawrence & Bullen, Ltd. v. Aflalo*, [1904] A.C. 17.

<sup>2</sup> *Abrahams v. Herbert Reich*, [1922] 1 K.B. 477.

<sup>3</sup> *Sims v. Marryat* (1851), 20 L.J.Q.B. 454.

In point of fact Captain Marryat had within his lifetime assigned the copyright of this book of adventures to another party in consideration of a payment of £300, and the agreement made subsequently therefore passed nothing at all, except a right to sue the heir.

#### DISCONTINUANCE OF PUBLICATION—*quantum meruit*

An important publishing case is usually cited as authority for claims on the basis of a *quantum meruit*,<sup>1</sup> i.e. the amount earned when only a part of the work is carried out. The principle involved is this: If a person contracts to do a thing, he has no claim at all for payment until he has completed his part of the contract. And if he is unavoidably prevented from such completion after carrying out, say, three-quarters of the work he still has ordinarily no claim for a *pro rata* payment.

To this there are exceptions: one is where the *other party* repudiates the contract, or makes it impossible for himself to carry out his side; then the plaintiff need not complete, but may sue for the value of the part of the work which he has carried out. Thus in the case referred to the plaintiff had contracted to contribute a volume on *Costume and Ancient Armour* to a periodical publication called the *Juvenile Library*, and in consideration for this he was to receive £100. The early numbers were not commercially successful and the venture was abandoned. At this time the plaintiff had made a journey to inspect a collection of armour, had made some drawings, and had in fact completed a considerable portion of the work.

The defence was that the plaintiff could not recover for want of having tendered the complete work pursuant to the contract. This plea was overruled in the judgment, and it was made clear that in circumstances such as these the action was no longer based upon the contract at all; but the contract being no longer in existence, it was based upon a *quantum meruit*, and the author could recover payment for the amount of work he had completed, by way of damages for breach of contract.

Another exception arises where the circumstances are such as to raise an implied promise to pay for what has already been done; as by taking the benefit of the partly completed work, when the defendant had the option to refuse it. This promise would not therefore be implied in the case of an unfinished contract to repair a house.

A further exception might arise from the provision of the Law Reform (Frustrated Contracts) Act, 1943, in the case of a contract which has become impossible of performance, to allow a contracting party who has done something under the contract whereby the other party has obtained valuable benefit to recover from that other party the value of that benefit.<sup>2</sup>

<sup>1</sup> *Planché v. Colburn* (1831), 8 Bing. 14.

<sup>2</sup> See 'Frustration', *post*, page 30.



**OBLIGATION TO PUBLISH**

Legal battles have from time to time centred round the situation created by an author who has assigned his copyright in consideration of a payment by royalty or share of profits, and whose agreement did not impose a clear obligation on the purchaser to publish.<sup>1</sup> Loosely worded agreements will always be the most fruitful of all sources of litigation, and the following unreported case,<sup>2</sup> the gist of which is given in Halsbury's *Laws of England*, is an excellent example.

Here the plaintiff had assigned his copyright in certain songs to an amalgamated newspaper syndicate, in consideration of a certain royalty to be paid on every copy sold by the syndicate. The songs were published in an important Sunday paper with the knowledge and approval of the defendant syndicate, and the plaintiff sought to recover royalties in respect of the publication and sales of the song by the newspaper proprietors.

It was held that the assignment was unconditional, except as to payment of royalties on sales by the syndicate, who were themselves under no obligation to publish; and the plaintiff could not recover royalties on sales by *third parties* who were not themselves agents of the defendant company.

**OBLIGATION TO MAKE A LATER AGREEMENT WITH THE SAME AUTHOR**

It will be of particular interest to many to hear of a difficulty that arose years ago in connection with that well-known publication, *The Temple Shakespeare*.<sup>3</sup> The publishers had made an agreement with an author that he should edit the whole of the plays, writing introductions, &c., that they should pay royalties and that the copyright was to vest in themselves. A further clause read as follows: 'In the event of a cheaper or any other form of edition being thought desirable by the publisher, it shall form the subject of agreement on similar *pro rata* terms to those embodied herein'.

The publication was exceedingly successful, a quarter of a million copies having been sold, and was in fact followed by a 'large' *Temple Shakespeare* with illustrations, and royalties were paid to the editor on this also. Subsequently a school edition was discussed, and the editor alleged a verbal agreement as to the royalty to be paid him in respect of it. The publishers, however, employed another author to prepare the school edition and the first editor sued for an injunction to restrain publication. He gained the day but was awarded damages in place of an injunction.

**PUBLISHERS' SALES AT RETAIL PRICES**

An interesting little point arose in a 1919 case where the agreement

<sup>1</sup> *Hole v. Bradbury* (1879), 12 Ch.D. 886.

<sup>2</sup> *Nicholls v. Amalgamated Press*, [1907] October 28.

<sup>3</sup> *Gollancz v. Dent*, [1903] 88 L.T. 358.

was that the publisher should account to the author for all sold copies of his book at the wholesale-trade price, less a commission of fifteen per cent., the author to pay the cost of printing and binding.<sup>1</sup>

The book was published at 5s. net, 3s. 4d. wholesale, but in some cases the defendants received more than 3s. 4d. from retail purchasers in their bookselling department, and this excess they claimed to retain. They alleged in their defence that there was no wholesale-trade price, that it varied for different customers, and that there was a usage entitling them to retain the excess over 3s. 4d.

In the result it was held that the defendants were bound to account to the plaintiff for all sold copies at the prices *actually received* by them, less fifteen per cent.

#### LICENCE TO PUBLISH

It is more usual of course for the publisher to bear all expenses of publication, and then failing any specific stipulation, he is entitled to fix the price of the book.<sup>2</sup> But it has also been decided that in such a contract the author is not precluded from contracting with another publisher in respect of a *second edition*, provided he has retained his copyright.<sup>3</sup> Thus unless a special clause is inserted, a contract between an author and a publisher passes only a licence to publish, but not an assignment of copyright. This important principle was laid down in an action brought by Charles Reade, the author of *The Cloister and the Hearth*, in a dispute about a second edition of *Peg Woffington*.

It appears, however, that different considerations will arise if the author has accepted any liability in respect of the expenses. Thus it was said in an old case that where a bookseller had undertaken to publish a work, and the profits were to be shared with the author after interest had been deducted in respect of money advanced by the bookseller, then in these circumstances the bookseller had a lien on the copyright for his disbursements.<sup>4</sup> This would effectively prevent the author from entering into an agreement with anyone else for the publication of a second edition before the first publisher had recovered his expenses.

In another case where an author sold the copyright of a work called *Beeton's Christmas Annual*, and in addition agreed to give his whole time to the plaintiff's service, it was held that the author could be restrained from advertising a rival work.<sup>5</sup>

#### FAILURE TO SUPPLY MANUSCRIPT

Where an author has contracted to write a book, and fails to supply

<sup>1</sup> *Kitson v. King*, [1919] 36 T.L.R. 162.

<sup>2</sup> *Reade v. Bentley* (1858), 3 K. & J. 656.

<sup>3</sup> *Warne v. Routledge* (1874), L.R. 18 Eq. 497.

<sup>4</sup> *Brook v. Wentworth* (1797), 3 Anst. 881.

<sup>5</sup> *Ward v. Beeton* (1874), L.R. 19 Eq. 207, see page 113, *post*.

the necessary manuscript, he is liable to the publishers for the loss of the profit they would otherwise have made;<sup>1</sup> but the Courts will not order the specific performance of the broken contract.

The question, however, does not usually arise in as simple a form as this. In one dispute an author was to write serial stories for a certain period extending over a year, and was not to write for any other newspaper published at less than sixpence. The author sent in a number of instalments, and then brought the current story to an abrupt conclusion, and entered into an engagement with another publisher.

It was held at the trial that the contract was equivalent to a yearly engagement, and although it was fulfilled by weekly contributions, yet the author had no right to terminate it as if it were a weekly engagement.<sup>2</sup>

#### WHAT IS AN EDITION?

In some cases where rights and liabilities in respect of profits attach to one edition only, a great deal will turn on the judicial construction given to the word 'edition'. The term has been held to mean every quantity of the book put forth to the trade at one time; and as soon as the expenses of printing, binding, advertising, &c., are closed, that constitutes the completion of the edition, although the types and plates may not be broken up, and although a part of the copies taken may be retained and stored in the warehouse of the publisher.<sup>3</sup>

#### AGENCY

The law of agency has at least one very special application in relation to authors. This arises through the employment of literary or press agents. An author will frequently make use of such a person to conduct the negotiations and arrange the terms of his contract with his publishers.

The agent's remuneration will often be by way of a commission on the sums paid by the publisher under the contract. Such a contract will usually be in the author's name, and the agent may also be named in the contract as a party to it, if his commission is specially referred to therein. It will as a rule be a part of the agent's duties to collect any royalties payable to the author from time to time.

Difficulties may arise at a later date, when the author may desire to put an end to the agency. The general law is that an agency may be determined in one or two ways. This may be by the act of the parties, if the principal is free to revoke the agent's authority, or if the agent renounces his agency. Or it may be by the operation of law, as when any agreed period of time has expired, or the agent's undertaking has been completely performed, or where either party dies.

<sup>1</sup> *Gale v. Leckie* (1817), <sup>2</sup> *Stark* 107.

<sup>2</sup> *Stiff v. Cassell* (1856), <sup>2</sup> *Jur. (N.S.)* 348.

<sup>3</sup> *Reade v. Bentley* (1858), <sup>3</sup> *K. & J.* 656.

These cases are comparatively simple; but it may easily happen that after many years the author feels that his agent has been amply remunerated for arranging an old contract. He may then decide to terminate the agent's authority to collect his royalties, and may give notice accordingly to the publishers.

In circumstances of this kind, any such attempt is foredoomed to failure and can always be successfully resisted by the literary agent.

The reason for this from the legal standpoint is that where any agency is 'coupled with an interest', and does not come to an end in one of the ways explained above, then the authority is said to be irrevocable, and the agency cannot be terminated at all without a breach of contract.

## CHAPTER FOUR

### PRINTERS' CONTRACTS

#### NATURE OF PRINTING CONTRACTS

Here we are confronted with a problem of considerable magnitude. Is a printing contract a contract to *sell goods*, or is it a contract to provide *work and labour*, the necessary materials being supplied by the contractor?

Doubtless many people would regard this as a distinction without a difference, and little more than a lawyer's quibble. It is therefore as well to observe at once, that a contract for sale of goods of a value of over £10 is in many circumstances unenforceable without written evidence, but such contracts do not require a stamped agreement.<sup>1</sup>

A contract of work and labour on the other hand does not require the written memorandum, provided that it is intended that it shall be completed within a year; but if the subject-matter is of a value of over £5, and if there is a written agreement, it must be stamped.

Again, if the customer dies before the work is completed and before the bill is paid, or if he in any way makes it impossible for the other party to carry out his undertaking, an action would lie against the executors for the value of such work as had been done (if it is a contract of work and labour); but there would be no action for the part value of a chattel which had not been finished.<sup>2</sup>

A further point is that if a printing contract is an 'agreement to buy' the question of transfer of title and property in the goods when made is regulated by Section 25 of the Sale of Goods Act, 1893, and Sections 8 and 9 of the Factors Act, 1889, which will be considered more fully later.<sup>3</sup>

#### FORMERLY, A CONTRACT OF SALE

Now, on the face of the subject it would certainly seem that a printing contract is an agreement to sell goods that are to be manufactured.

It has been said that a contract of sale is a contract whose main object is the transfer of a chattel to the buyer; but if the main object is not the transfer of a chattel *quâ* chattel, the contract is for work and labour.

Where, for example, materials are used in the erection of a building there is no doubt that the contract is one of work and labour, and

<sup>1</sup> See Sale of Goods Act, Section 4, page 285.

<sup>2</sup> *Lee v. Griffin* (1861), 30 L.J.Q.B. 254.

<sup>3</sup> See pages 41, 42, 45, 296.

even the materials used in the work cannot be regarded as 'goods sold and delivered'.<sup>1</sup>

On principle, then, it may be said that a contract to supply printed matter *should* be a contract for the sale of goods. In the old editions of a well-known text-book the law was thus stated: 'If the materials for the book as well as the work itself have been furnished by the workman, then the contract is a contract of sale. If on the other hand the employer has furnished the materials, and the undertaker of the work contributes his labour merely, the contract is a contract of letting and hiring (of services) merely.'<sup>2</sup>

Unfortunately, however, the legal position of printing contracts was redefined in a High Court action of 1856.

#### THE DECISION IN CLAY v. YATES<sup>3</sup>

Portia, in the *Merchant of Venice*, it will be remembered, declined a suggestion that in order to achieve a great right she might well do a little wrong. 'It may not be,' she said, 'twili be recorded for a precedent, and many an error by the same example will rush into the state.'

The case now to be considered quite possibly exemplifies the same mischief which, expressed colloquially, is that 'Hard cases make bad law'.

A printer had entered into a contract to print a second edition of a work on *Military Tactics*, together with a new dedication of the work to Sir William Napier. He printed the body of the work, but when the proof of the 'Dedication' had been corrected and returned to him, he discovered that it contained libellous matter.

The printer refused to go on with the printing and the author refused to accept the book without its dedication; consequently, this action was brought to recover the price of printing the body of the work.

The defence set up was that there was no written memorandum to satisfy the Statute of Frauds (now the Sale of Goods Act);<sup>4</sup> and secondly that the contract was an entire one to print the dedication as well as the body of the work, and that having failed to print the dedication the printer was not entitled to recover any part of his demand.

The plaintiff's answer was that *it was a contract of work and labour*, and not a sale of goods at all, and he was entitled to a fair remuneration for the work done. Now it was obvious that in fairness the printer ought to be paid, and it is of the very greatest interest to observe the grounds on which he was given judgment.

<sup>1</sup> *Clarke v. Bulmer* (1843), 11 M. & W. 243.

<sup>2</sup> *Addison on Contracts*, 2nd Edition, page 260.

<sup>3</sup> *Clay v. Yates* (1856), 25 L.J. Ex. 237.

<sup>4</sup> See page 32.

Pollock, C.B., said, 'It seems to me the true rule is this, whether the work and labour is of the essence of the contract, or whether it is the materials that are found. My impression is, that in the case of a work of art, whether it be silver or gold or marble or common plaster, the material is of no sort of importance as compared with the labour; and, therefore, that all this would be recoverable as work and labour and materials found. \*

'No doubt it is a chattel that was bargained for and delivered, and it might be recovered as goods sold and delivered, but still it would not prevent the price from being recovered as work and labour and materials found.'

As will shortly be seen, other eminent judges do not regard the first part of this statement as being the law;<sup>1</sup> the second part inferring that it is a hybrid contract and changes its nature at the moment of delivery appears to be equally questionable.

Two of the learned barons composing the Court did not express themselves on the point, and the remaining judgment of Martin, B., took a different line.

He suggests that the true value of the book lies in the value of the manuscript, and he says: 'Supposing there was no contract as to payment, and the plaintiff sought to recover the value of that which he had delivered, would that be the value of the book as a book? I apprehend not, for the book might not be worth half the value of the paper it was written on. It is clear that the printer would be entitled to be paid his work and materials.'

#### AN ANALOGY

It is certainly tempting to follow this line of argument into the field of mechanical devices. Is a contract to make an article of this kind 'work and labour' simply because the whole value is in the idea?

For example, there was a case where an inventor was commissioned by a firm of thread manufacturers to have some spinning frames made. He gave the order to S. and superintended the manufacture. In an action which followed it was claimed that S. could recover for work and labour; but it was very properly held that S. had expended the labour *for his own benefit* in order to produce the chattel that he had agreed to sell,<sup>2</sup> and that the contract was one of sale.

Here the idea was supplied by the inventor (who takes the place of the author), while the frame-maker represents the printer, and it is submitted that on this view of the case the judgment is in complete conflict with Baron Martin's statement of the law.

<sup>1</sup> *Isaacs v. Hardy* (1884), Cab. & Ell. 287.

<sup>2</sup> *Atkinson v. Bell* (1828), 8 B. & C. 277.

**CLAY v. YATES CONSIDERED**

In a later case<sup>1</sup>, where a lady was fitted for a set of artificial teeth, and then died before it was finished, the dentist sued her executor for the work and labour expended.

The defence was that the plate was a chattel, and that there was no action unless it was delivered. The plaintiff relied on *Clay v. Yates*, which was then considered. One learned judge, Crompton, J., said that he had some doubt as to the propriety of that decision; another, Blackburn, J., deals emphatically with the question of the value of materials. 'If', he says, 'Benevenuto Cellini had contracted to execute a work of art, I do not think that, much as the value of the skill might exceed that of the materials, the contract would have been any the less for the sale of a chattel.'

'Where on the other hand an attorney is employed to draw a deed it would be an abuse of language to say that the paper or parchment of the deed was goods sold and delivered.'

In this case the plate of teeth was held to be a chattel, and it was held that *Clay v. Yates* was not in point. It was not said that the printer was in the position of the attorney (who clearly comes the other side of the line, and can claim for work and labour), but the view expressed was that the position of a printer was a border-line case, and might perhaps be supported on the argument adduced by Baron Martin.

**PRACTICAL POSITION**

The upshot of all this is, in the first place, that writs to recover sums due on printing contracts are commonly indorsed for 'work and labour' in accordance with *Clay v. Yates*. On the other hand, in placing printing orders it is certain that stamped agreements are not commonly used; and where goods have been actually delivered, the Sale of Goods Act, 1893, is ordinarily applied.

Indeed, although the legal position is in one or two particulars not entirely satisfactory for the reasons indicated, yet in general and apart from a few technical points, the Act is so obviously applicable as to dispose of the difficulty from the outset.

If at any time a case should arise which would warrant the point being taken to the Court of Appeal, it is not improbable that the decision in *Clay v. Yates* might be reversed, and that it might be decided that printing contracts are, after all, properly classified as 'sale of goods' in every case.

In concluding the chapter on this subject the joint authors expressed the view, stated in the immediately foregoing paragraph, to the effect that the decision in *Clay v. Yates* might be expected to be reversed by the Court of Appeal, and that it might be decided that printing contracts are after all properly classified as 'sale of goods' in every case.

<sup>1</sup> *Lee v. Griffin* (1861), 30 L.J.Q.B. 254.



No case has arisen on a printing contract, but there has been a recent case of a contract to paint a portrait<sup>1</sup> in which the *Clay* case was considered.

The decision in this portrait-painting case was that the contract was one for work and labour and not for the sale of goods as the substance of the contract was that skill and labour should be exercised upon the production of the portrait, and that it was only ancillary to that contract that there would pass from the artist to his customer some materials, namely the paint and the canvas, in addition to the skill and labour involved in the production of the portrait and that therefore the artist could recover, notwithstanding that there was no note or memorandum in writing forming the contract.

In the lower court it had been held that a contract had been made but that, according to the decision in *Lee v. Griffin* (the artificial teeth case), it was an agreement for the sale of goods of the value of more than £10 of which contract there was no note or memorandum in writing and that therefore it came under the Sale of Goods Act, Section 4, and was not enforceable. The appellant (the artist) relied on the *Clay v. Yates* decision and, although it was argued for the respondent that the test laid down by Pollock, C.B., in the *Clay* case was not now binding, judgment was given on the lines of that decision. The case was decided on its particular facts, but the point to observe is that the subject-matter could be said to be a reasonable parallel to a printing contract and that the *Clay* decision was relied upon and was not rejected.

<sup>1</sup> *Robinson v. Graves*, [1935] L.R., K.B.

## CHAPTER FIVE

### PRINTERS' CONTRACTS (*contd.*)

#### I. SUBMISSION OF PROOFS AND STANDARD CONDITIONS

##### PRELIMINARY WORK IN COMPETITION

A claim which is not infrequently made and which is in almost every case foredoomed to failure, is in respect of the cost of designs and other preliminary work prepared with a view to securing an order.

In these days of keen competition many firms expend very substantial sums in this way, and when the contract goes elsewhere, there is a tendency seriously to consider the chances of an action for damages—especially when the outlay was made in reliance upon a representation that the order is 'virtually yours'.

The law is that in such cases, apart from misrepresentation or fraud, there must be a contract on which to base the claim, i.e. an offer and an acceptance. No promise to pay a fee would be implied from a mere invitation to submit designs and estimates, coupled with the printer's reply promising to compete for the contract.

The customer may, of course, go a step further and dishonestly appropriate the whole or a part of the rejected design. The printer will then have his remedy in an action for infringement of copyright in an artistic work, and will be able to recover substantial damages.

##### PRELIMINARY WORK IN EXECUTION OF ORDER

Where the preparation of designs, setting up of type and making of blocks or plates follow a firm order which is afterwards cancelled, the position is completely different and the printer's claim for damages includes the amount so expended as well as the loss of profit anticipated upon the contract.

If, on the other hand, in a competition for a contract, the lowest and successful tender is actually based upon some omission or mistake in calculation (as not infrequently happens), the printer may only discover the true position after commencing the work. He has no right at all to throw up the work rather than incur a heavy loss, and if he does so the measure of the customer's damage is the difference between the estimate and the amount the customer has to pay elsewhere in getting the order carried out.

Even though some of the work may have been delivered, nothing can be claimed<sup>1</sup> on the footing of a computation of the value of labour and materials expended, if a contract (which was not divisible) has been abandoned.

<sup>1</sup> *Dakin v. Lee*, [1916] 1 K.B. 566.

## CORRECTION OF PROOFS

A point which not infrequently arises in printing work relates to mistakes which were overlooked when the proofs were passed by the customer. Can the printer claim protection and immunity in respect of his own mistakes in setting up, if the mistakes were passed?

## THE GENERAL LAW

In general a contractor who undertakes to carry out certain work is under a legal obligation to carry out that work with reasonable skill, and if he fails he is liable for damages arising out of this breach of his contract.

## WORK DONE TO APPROVAL

The position is different if there is a clause in a written contract referring to proofs which are to be submitted and approved in a certain time, or any similar condition. This at once makes the contract one for 'work to be done to approval' and the approval once given is binding,<sup>1</sup> and such approval must not be unreasonably withheld.

## NO EXPRESS CONDITION TO SUBMIT PROOFS

The difficulty arises when there is no express condition as to proofs. The work is set up in the usual way and a few impressions are submitted to the customer.

In the first place the customer is clearly under no duty or obligation at *Common Law* to the printer in the matter of correcting the proofs, and if he should refuse the printer is under a Common Law liability to carry out the work with the skill and judgment of an expert tradesman. The customer, on the other hand, would only be entitled to complain in respect of obvious errors which had arisen entirely through the negligence of the printer.

## USAGE

The next question to be considered is whether or not it is an *implied condition* of every contract for printing work that proofs are to be submitted, and that if approved the printer is relieved of responsibility.

As was stated above, the law imposes on any contractor in a trade a duty to carry out the work contracted for with reasonable skill and without negligence. 'He may contract himself out of those duties, but unless he proves such a contract the duties remain.'<sup>2</sup>

This Common Law principle can only be displaced if a *trade usage* can be proved for the submission and approval of proofs, the contract then becoming one for 'work to approval'. Curiously enough, there is

<sup>1</sup> Halsbury, *Laws of England*, volume iii, page 204.

<sup>2</sup> *Nelson Line v. Nelson*, [1908] A.C. 16.

no reported case in the High Court in which the usage has been established once and for all, but probably it could be proved whenever necessary. The practice is referred to in the judgment of *Clay v. Yates*.<sup>1</sup>

This view, although correct in the opinion of the authors, is, in the absence of authority, necessarily a tentative one.

#### DISPLAYED WORK

In the case of advertisements and other displayed work the position is much less doubtful. Here the customer often only describes his requirements in general terms, and it is then abundantly clear that no order is intended to be executed until the arrangement has been approved.

Whether this preliminary order constitutes a binding contract will depend upon the circumstances, but if so it is a term of the contract express or implied that a proof should be submitted; and the customer is chargeable with the expenses of preparing it. In this case, as in a contract where a proof is expressly stipulated for, if the customer in any way notifies his approval, he cannot afterwards go back on it and recover, even for obvious defects.<sup>2</sup>

#### AUTHOR'S RIGHTS TO MAKE ALTERATIONS

Hitherto the question of proof-reading has been examined to discover what protection, if any, is afforded to the printer thereby. The other side of the question must now be looked at, to see what right a customer has of *requiring* a proof for the purpose of changing the original matter.

The answer *at Common Law* is that he has no such right; this is work extra to the original contract, and as such it is chargeable at a reasonable rate.

#### USAGE AND SPECIAL CONTRACT

But this does not conclude the question, supposing that a usage can be proved to allow a reasonable amount of alteration without extra cost. Almost certainly such a usage could be shown, although here again it does not appear to have been judicially established in the High Court. The quantity of permissible alteration would doubtless vary according to the price and quality of the work. In publishers' contracts there is frequently a clause limiting alterations to ten or fifteen per cent. of the bulk, and providing that anything in excess of this will be chargeable to the author or customer.

The cost of alteration is limited as far as possible by the system of setting up the type in galleys, each containing several pages of matter, and in this way a change in the bulk does not necessitate a complete rearrangement of pages. Even then, if the work consists of very long

<sup>1</sup> *Clay v. Yates* (1856), 25 L.J. Ex. 237.

<sup>2</sup> Halsbury, *Laws of England*, volume iii, page 204.

paragraphs extending to a page or more without a break, any increase or diminution in quantity is a serious consideration, entailing as it does the redivision of every line of the paragraph.

#### VARIATION OF QUANTITIES

There is a custom of the printing trade whereby printers are entitled to print and charge for a margin of five per cent. (in colour work ten per cent.) over the quantity ordered, and, conversely, they are entitled to deliver five per cent. less—and to allow a corresponding reduction in price.

#### STANDARD CONDITIONS OF PRINTERS

There has been in use for many years by printers a body of conditions of contract known as the 'Standard Conditions of the Printing Trade as issued by the British Federation of Master Printers'. Some of these conditions can be said to be established as 'custom of the trade' but the conditions as a whole have not been established as such by any decision of a higher Court though they probably could be proved as such if occasion arose.

In the absence of such a decision, printers would not be safe to regard the conditions as part of their contracts with customers if they are not specifically imported into the contract. To make sure that the conditions are binding in any contract a printer should show a copy of them on his quotation and direct the customer's attention to them. It is not sufficient to print them on the back of the quotation or letter paper and expect the customer to see them there. If printed on the back (as is usual) there must also be a specific reference to them on the front to the effect that the quotation is subject to the conditions as appearing on the back.

These conditions are as follows:

#### STANDARD CONDITIONS

and Recognised Customs of the Printing Trade as issued by The British Federation of Master Printers

1. *Preliminary Work*—Work produced, whether experimentally or otherwise, at customer's request will be charged for.

2. *Proofs*—Author's corrections on and after first proof, including alterations in style, will be charged extra. Proofs of all work may be submitted for customer's approval, and no responsibility will be accepted for any errors in proofs which may be passed by him.

3. *Delivery and Payment*—In the absence of any agreement to the contrary, goods will be delivered when completed and payment for the goods shall be made against delivery.

4. *Expedited Delivery*—Should delivery of work be required sooner than the normal time requisite for its proper production, every effort will be made to secure freedom from defects, but reasonable allowance must be made by the customer in such cases. Should such delivery necessitate overtime being worked or other additional cost being incurred, a charge will be made to cover the increased cost.

5. *Quantity Delivered*—Every endeavour will be made to deliver the correct quantity ordered, but, owing to the difficulty of producing exact quantities, quotations are conditional upon a margin of five per cent. (in colour work ten per cent.) being allowed for overs or shortage, the same to be charged for or deducted.

6. *Claims*—Any complaint must be made within ten days of receipt of goods.

7. *Standing Matter and Printers' Materials*—Type may be distributed and/or lithographic, photogravure, or other work effaced immediately after the order is executed, unless written arrangements are made to the contrary. In the latter event, rent shall be paid unless any other specific arrangement has been made.

8. *Customer's Property*—Customer's property when supplied will be held at customer's risk. Every care will be taken to secure the best results where materials are supplied by customers, but responsibility will not be accepted for imperfect work caused by defects in or unsuitability of materials so supplied.

9. *Illegal Matter*—The printers shall not be required to print any matter which in their opinion is of an illegal nature.

10. *Periodical Publications*—In the absence of any agreement to the contrary, quotations are given upon the condition that not less than three months' notice is given to terminate the contract for the printing of monthly publications and not less than one month's notice in the case of weekly publications.

11. *Consequential Loss*—Responsibility will not be accepted for consequential loss or damage occasioned by errors or by delay in delivery.

12. *Force Majeure*—Every effort will be made to carry out any contract based on a quotation, but the due performance of it is subject to variation or cancellation owing to an Act of God, War, Strikes, Lock-outs, Fire, Flood, Drought, or any other cause beyond control, or owing to inability to procure materials or articles except at increased prices due to any of the foregoing causes.

13. *Cost Variation*—Quotations are based on the current cost of production (materials, working hours, and wages), and are subject to amendment on or after acceptance to meet any recognised rise or fall in such cost.

## II. FRUSTRATION OF CONTRACT

This section deals shortly with contracts that are impossible to perform, otherwise described as 'frustrated' contracts, and the subject of frustration has taken on some importance for printers since the Law Reform (Frustrated Contracts) Act, 1943.

There may be obvious physical impossibility of performance or there may be one or more grounds of legal impossibility, but the only ground of frustration that need be dealt with here is impossibility of performance after the contract has been made.

For a printer or publisher to be in a position to plead that he should have the benefit of the Act because a contract he has made has become frustrated, he must be in a position to show not merely that it has become less remunerative or more costly than he had expected, but that he is prevented from carrying out his undertaking or that there was a condition of the contract on which he could rely for his release from his obligation.<sup>1</sup>

The circumstances in which performance of the contract is made impossible for a printer or publisher may perhaps be found under the head of supervening illegality, and the World War No. 2 was the cause of many such frustrations. The restrictions or prohibitions imposed by the Ministry of Supply prevented many contracts from being carried out in part or *in toto*. It has been said that such a result is really a discharge of the contract.<sup>2</sup>

To remedy an unsatisfactory state of the law following various decisions of the Courts the Act of 1943 was passed. It provides that 'where a contract governed by English law has become impossible of performance or been otherwise frustrated and the parties thereto have for that reason been discharged from the further performance of the contract', certain provisions of the Act are to have effect. These provisions cover two classes of case and both may be of interest to printers.

Formerly, according to English law though not Scots law, if a man paid money on the strength of a contract which never actually came into force he could not get it back. The Act allows him to recover what he paid but the man who has received the money will be entitled to retain sufficient to recoup himself for expense incurred in getting ready to perform the contract or in pursuance of the contract. There

<sup>1</sup> *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Tatem v. Gamboa*, [1939] 1 R.B. 132; *Denny, Nutt & Dickson v. Fraser*, [1944] A.C.

<sup>2</sup> *De Beeche v. South American Stores*, [1935] A.C. 148.

may be very few cases where a printer receives a payment in advance and this provision may not greatly concern printers.

Then there is the second class of case, and this may be of greater interest to printers. It is the case of work having been done and the doer of the work being prevented from completing the work he contracted to do. It might be painting a house or printing a catalogue. The wartime Ministry of Supply might not have released sufficient paint or paper as the case might be, or some other cause might intervene to prevent completion without the painter or the printer being at fault.

The law had previously said that the painter or the printer could only ask for payment if he did the whole job as contracted for. The position now is that if the painter who undertook to paint a house has been prevented from doing that but has painted a part of it he can claim payment for that much of the job seeing that his customer has clearly received some benefit. Similarly, if a printer who undertook to print 5,000 catalogues has been prevented from doing the whole job but offers delivery of, say, 2,000, he can claim for that lesser quantity if he can show that these would, so far, meet the customer's purpose.

It is to be noted that the Act specifically refers only to contracts governed by English law and that this must be taken as excluding those governed by Scots law and doubtless also those governed by the law of Northern Ireland, the Dominions and Colonies.



## CHAPTER SIX

### THE ORDER

(*Sale of Goods Act*)

SUBJECT to what has been said in Chapter Four on the nature of printing contracts, it is necessary now to consider one of the finest codifying Acts of Parliament on the Statute Book, the Sale of Goods Act, 1893.

In view of the particular difficulty that has been dealt with, it should be repeated that the bulk of its provisions are in any case applicable to printers' contracts, reserving only one or two points. The first is whether a note or memorandum or the order is actually necessary in these cases; or whether, if a written order is relied upon, it ought to be stamped. The second is whether, if part only is delivered, and the contract cannot be completed by the default of the customer, the printer has an independent claim upon an implied contract for the part delivered.<sup>1</sup>

On either view of the law, however, if the customer is ready to accept the goods, and the printer makes default, then he is not entitled to recover until the whole of the work is completed and delivered.<sup>2</sup>

For example, where a printer has been employed to print a work of which the impression is to be a certain number of copies, if a fire breaks out and consumes the premises before the whole number has been worked off, the printer cannot recover anything, although a part has been actually delivered.<sup>3</sup> An exception to this may, however, occur by reason of the provisions of the Law Reform (Frustration of Contracts) Act, 1943.<sup>4</sup>

#### FORMATION OF CONTRACT (Section 4)

One of the most important provisions of the Sale of Goods Act, reproducing a section of the Statute of Frauds (1677), requires written evidence to enforce certain contracts for the sale of goods. It is, of course, the fact that in a large number of cases it suits the trader better to rely on his customer's integrity than to require written orders, but from the legal standpoint this is irrelevant.

The important words of the section are:

'A contract for the sale of any goods of the value of £10 and upwards shall not be enforceable, unless the buyer shall accept part of the goods, or give something in earnest to bind the contract, or

<sup>1</sup> *Clay v. Yates* (1856), 25 L.J. Ex. 237; and see pages 21 to 24.

<sup>2</sup> *Gillett v. Mawman* (1808), Taunt 137.

<sup>3</sup> *Adlard v. Booth* (1835), 7 C. & P. 108.

<sup>4</sup> See page 30.

in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent.'<sup>1</sup>

'Acceptance' sufficient to satisfy the section is constituted by any act in relation to the goods done by the buyer *which recognises a pre-existing contract of sale*. Thus in one case<sup>2</sup> which concerned a verbal agreement to purchase hay, the buyer on delivery of the hay took a handful of it, and said: 'This is not to my sample; I shall not have it.' This action and these words together constituted sufficient 'acceptance', and further evidence in writing of the fact that the dissatisfied buyer had placed an order was unnecessary.

On the point of part payment two cases may be specially mentioned. In the one<sup>3</sup> it had been arranged that a sum of £1 which had been overpaid on a previous transaction should go on account of the present purchase. This was held not to be 'part payment' within the meaning of the Act, so as to dispense with other evidence of the contract.

In the other case<sup>4</sup> a cheque was sent by post at the same time as goods were ordered by telephone. The cheque was at once returned, and this again was not 'part payment' to enable the buyer to enforce this contract. The position would have been different if the cheque had been retained for some days before being returned.<sup>5</sup>

#### NOTE OR MEMORANDUM

Where, in the absence of acceptance or part payment, written evidence of the contract is necessary, the note or memorandum must designate the parties by name or description, the goods sold, and the price if agreed on.

Oral evidence is not usually admissible to connect together several documents relied upon, so as to form the necessary memorandum. Such documents must be clearly related to one another on their face without any explanations being necessary. The writing need not be contemporaneous with the contract but may be altogether later in date, if it constitutes an unequivocal acknowledgment of the transaction with the necessary particulars. It may even take the form of a repudiation of obligation provided the existence of the original agreement is not denied; a letter containing a statement such as: 'I know that I gave the order but I never will pay because, &c.' would therefore be amply sufficient for this purpose.

#### CANCELLATION OR VARIATION OF CONTRACT

If the parties agree by word of mouth that the written contract is to

<sup>1</sup> See page 285.

<sup>2</sup> *Abbott v. Wolsey*, [1895] 2 Q.B. 97.

<sup>3</sup> *Norton v. Davison*, [1899] 1 Q.B. 401.

<sup>4</sup> *Davis v. Phillips, Mills & Co.*, [1907] 24 T.L.R. 4.

<sup>5</sup> *Parker v. Crisp*, [1919] 1 K.B. 481.

be *rescinded*, this is perfectly valid. The law does not say that every contract of a certain kind shall be enforceable, but merely that if there is *no written evidence* it shall *not* be enforceable—a very different thing.

On the other hand, if the contract is not cancelled but merely *varied*, then the new terms must be in writing and connected up with the original document. This applies to altered terms as to payment, or as to quantities of goods for delivery, or as to time for completion.

Oral evidence is always admissible to show that the written contract is void as having been induced by fraud, or by a fundamental mistake.

#### ASCERTAINMENT OF THE PRICE (Section 8)

'The price in a contract of sale may be fixed by the contract, or may be left to be fixed in any manner thereby agreed, or may be determined by the course of dealing between the parties.

'Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.'<sup>1</sup>

#### GOODS DESTROYED (Section 6)

'Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void.'<sup>2</sup>

Goods are said to have 'perished' when they no longer answer to the description of them given in the contract; thus damage by water may effect this, although the nature of the goods is not so completely changed as in the case of destruction by fire.<sup>3</sup>

This section only refers to 'specific goods', and this in all cases means goods identified and agreed upon at the time the contract of sale was made (Section 62).<sup>4</sup> 'Future goods' are necessarily always excluded; and of existing goods also those that are 'generic' and not specific.

#### GENERIC AND SPECIFIC GOODS

Thus where a merchant has a stock of a particular kind of paper and contracts to sell 500 reams, it would be quite immaterial if at the time he entered into the contract the whole of his stock was destroyed. He must supply the paper or be liable for damages if the other party has suffered.

If on the other hand the contract specified the paper as being 'now in my warehouse', the case would be covered by the section, and the seller would be free from liability.

<sup>1</sup> See page 286.

<sup>2</sup> See page 286.

<sup>3</sup> *Barr v. Gibson* (1838), 3 M. & W. 390.

<sup>4</sup> See page 298.

## GOODS PERISHING AFTER AGREEMENT TO SELL (Section 7)

This section covers a slightly different case:

'Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby made void.'<sup>1</sup>

This refers to an 'agreement for sale' and not to a 'sale'. The loss of his goods falls on the seller, and the loss of his bargain on the buyer; neither side has any claim on the other.

In connection with this, Section 20 may be inserted:

'Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

'Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault, as regards any loss which might not have occurred but for such fault. Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as the bailee of the goods of the other party.'<sup>2</sup>

In the matter of contrary intention ('unless otherwise agreed') it should be noted that if a contract provides for the goods to be 'at customer's risk', or deals with the matter specifically in any way, then Section 20 is ousted.<sup>3</sup>

Similarly, a contrary intention may be inferred from a trade custom, e.g. that where books are sent 'on sale or return' at the request of a customer, they are at the risk of such customer until paid for or returned, although the property or ownership of the books remains in the seller.<sup>4</sup>

## INSURANCE

Where goods have been destroyed by fire the question of insurance is usually the first to be raised. It has been held that there is no general custom of the trade by which printers are bound to insure the paper of the works which they print for their customers.<sup>5</sup>

In this case a printer undertook to insure for a publisher the paper sent to him for printing a work. He afterwards effected an insurance *in his own name*; there was a loss by fire and he recovered the amount

<sup>1</sup> See page 286.

<sup>2</sup> See page 286.

<sup>3</sup> *Rutter v. Palmer*, [1922] 2 K.B. 87.

<sup>4</sup> *Bewington v. Dale*, [1902] 7 Com. Cas. 112; and see page 296, Section 55.

<sup>5</sup> *Gillet v. Mauman* (1808), 1 Taunt 137.

of his insurance, but this was considerably short of the loss. It was pointed out at the beginning of the present chapter<sup>1</sup> that the printer could not recover the cost of the work done; independently of this, he was liable to the publisher for not insuring in the latter's name. But this was only by reason of the special stipulation; without it the publisher would have had to stand the loss himself.

Where loss is incurred by any person's default or negligence, and part of the loss is recovered by an insurance effected by the other party, the person at fault has no claim to have the insurance money deducted from the damages.<sup>2</sup>

#### UNCOMPLETED WORK (CONTRACT REPUDIATED)

Where a printer has been prevented by his customer from completing the work he contracted to carry out he may claim for part payment on the basis of a *quantum meruit*, i.e. the amount actually earned. For remarks on this see under 'Discontinuance of Publication', page 15, *supra*.

<sup>1</sup> See page 32.

<sup>2</sup> *Bradburn v. G.W.R.* (1874), L.R. 10 Ex. 1.

## CHAPTER SEVEN

### PASSING OF OWNERSHIP

(*Sale of Goods Act* (contd.))

It will readily be seen that it is often of importance to fix with precision the time when the ownership of goods passed from seller to buyer. Apart from the goods being destroyed, there is, for example, the possibility of one of the parties becoming bankrupt, and the question then arises whether the goods can be claimed by the trustee in bankruptcy from the other party. Further sections of the *Sale of Goods Act* are here referred to.

#### AGREEMENT TO SELL (Section 5)

In this connection it is desirable to distinguish clearly between a sale and an agreement to sell.

‘Where by contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an *agreement to sell* the goods.’<sup>1</sup>

‘Future goods’ are goods to be manufactured or acquired by the seller, after the making of the contract of sale.

An ‘agreement to sell’ in these circumstances becomes a ‘sale’ when the goods are manufactured and the ownership passes.

#### SALE OF UNASCERTAINED GOODS (Section 16)

There is one general rule as to the passing of property in ‘generic’ or unascertained goods. This is that no property in such goods is transferred to the buyer, unless and until the goods are ‘ascertained’.

For example, a publisher having a stock of 200 copies of a certain book sells 50 to a bookseller and receives the price. He does nothing, however, to ascertain the goods, or to ‘appropriate’ them to the contract. In such a case no property in any of the books passes to the bookseller, and if the publisher becomes bankrupt, his trustee can retain the whole of the stock of 200.<sup>2</sup>

#### INTENTION (Section 17)

The intention of the parties, as indicated by the terms of the contract, and all the circumstances of the case, is the governing factor in fixing the time when the property passes.

<sup>1</sup> See page 286.

<sup>2</sup> *Hayman v. M'Lintock*, [1907] 9 F.S.C. 996; see also page 39 (Rule 5).

Suppose, as an illustration, that an order has been placed to print a thousand copies of a pamphlet, and the printer, being in a small way of business, has obtained a substantial payment in advance.

Before completing the work he becomes bankrupt; can his customer now claim the uncompleted work as his property? In general the answer will be in the negative, because the contract is for the completed work and the buyer obtains no property in the materials.<sup>1</sup>

If, on the other hand, delivery was to be by instalments and payment was due as soon as each instalment was ready, the buyer's position in respect of completed instalments would be as strong as if the whole were ready.

#### RULES TO ASCERTAIN INTENTION (Section 18)

In many cases, however, when a dispute arises, there is no clear indication of intention, and the Act has therefore laid down certain rules for ascertaining the time at which the property in the goods is to pass to the buyer unless a different intention appears.

There are five of these rules, and as the principles enunciated are of the greatest importance in the practical application of the Sale of Goods Act, they will be set out in full.

##### *Rule 1*

'Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.'

##### *Rule 2*

'Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.'

##### *Rule 3*

'Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.'

##### *Rule 4*

'When goods are delivered to the buyer on approval, or on sale or return, or other similar terms, the property therein passes to the buyer:

(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.

<sup>1</sup> *Reid v. Macbeth and Gray*, [1904] A.C. 223.

- (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.'

#### Rule 5

'(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

'(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier, or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.'

<sup>1</sup>

#### FUTURE GOODS

Where goods have to be specially manufactured for the buyer the contract is sometimes considered as governed by Rule 2, although Rule 5 is more generally applicable. In either case the principle is that, failing a contrary intention, the property in such an article will not pass until it is delivered in a finished state, or until it is ready for delivery and approved by the buyer.<sup>2</sup>

The term 'Appropriation to the contract' must not be too narrowly construed in the case where a seller has merely set a certain quantity of stock aside for the order. There must usually be a subsequent act by the buyer indicating his approval, or the seller's act must be clearly irrevocable; in other words the act must constitute either actual or 'constructive' delivery of the goods to the buyer.<sup>3</sup>

#### GOODS ON APPROVAL

This subject is dealt with at greater length in the chapters dealing with 'hire agreements'. It must be remembered that a trade usage to hold stocks on sale or return, if clearly established, may oust the operation of Rule 4.<sup>4</sup>

The words 'any act adopting the transaction' are frequently of importance. Thus where goods are sent on sale or return to a tradesman and he then sells or pawns, or even loses them,<sup>5</sup> this is an 'act

<sup>1</sup> See page 288 and 289.

<sup>2</sup> *Clark v. Spence* (1836), 4 A. & E. 448

<sup>3</sup> See page 37.

<sup>4</sup> See page 288 and Section 55, page 295.

<sup>5</sup> *Genn v. Winkel*, [1912] 107 L.T. 434 C.A.



adopting the transaction' and the property in the goods passes to that tradesman. If now the tradesman defaults in paying for the goods, the original owner cannot claim the goods, e.g. from the pawnbroker, but is left with his action against the tradesman.<sup>1</sup>

After such an experience the original owner will learn the value of what is called a 'bailee note', or some document setting out that the goods remain his property until paid for or invoiced. Then if the tradesman makes away with the goods, the owner will be able to 'follow them' into the hands of the person who receives them.<sup>2</sup> Such a document showing a 'special intention' is one of the ways of taking the case out of Rule 4.

#### TRANSFER OF TITLE (Section 21)

The sections of the Sale of Goods Act dealing with transfer of property which have just been considered are directed towards ascertaining the supposed intention of the parties from their conduct. But there are cases where intention does not arise, as, to take the most familiar example, where stolen goods are privately disposed of.

Section 21 of the Act says that subject to certain provisions where goods are sold by a person who is not the owner, the buyer acquires no better title to the goods than the seller had.<sup>3</sup>

One general exception occurs where the owner of the goods is by his conduct precluded from denying the seller's authority; as where he knew of the sale and did nothing to prevent it. Nothing in the section will invalidate a sale under an order of the Court or under a statutory power of sale.

Thus if a merchant innocently buys a stock of paper from a person who has obtained it by fraud, and then sells it to a printer, he may be liable to the true owner for conversion of his paper.<sup>4</sup>

The exact liability will be considered under 'voidable titles'; it will hinge upon whether or no the original owner had taken steps to set aside the fraudulent transaction before the second sale. If the paper had not been obtained by fraud but simply stolen, the true owner can always reclaim it subject to the exception set out in the next paragraph.

#### SALES IN MARKET OVERT (Section 22)

'Where goods are sold in "market overt", the buyer acquires a good title provided he buys in good faith, and without notice of any defect or want of title on the part of the seller.'<sup>5</sup>

<sup>1</sup> *Kirkham v. Attenborough*, [1897] 1 Q.B. 201.

<sup>2</sup> *Weiner v. Gill*, [1906] 2 K.B. 574.

<sup>3</sup> See page 289.

<sup>4</sup> *Hollins v. Fowler* (1875), L.R. 7 H.L. 757.

<sup>5</sup> See page 290.

The term 'market overt' applies to public and legally constituted markets, and also by ancient custom to open shops in the City of London; but the sale must be *by* and not *to* the shopkeeper. Thus an innocent purchaser of stolen goods might get a good title in a shop in Fleet Street, while a similar sale in the Strand could be set aside.

#### VOIDABLE TITLES (Section 23)

'Where the seller of goods has a *voidable* title, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect in title.'<sup>1</sup>

The application of this section often depends on somewhat subtle distinctions. To begin with if the goods were obtained by theft, of course no title could be obtained except by a sale in market overt.

But suppose that a person enters a warehouse and falsely represents that he is Mr. Brown, a well-known printer; he takes away certain goods and sells them immediately to a buyer without notice of the fraud. Here there is a contract of sale with an identified person, and until such time as the warehouse keeper discovers the truth and sets the contract aside, it is a good contract; and if meanwhile the goods are sold, the buyer gets a good title'<sup>2</sup>

If, however, this person had sent a written order, forging Brown's signature, and the goods were delivered in consequence, it appears that there would have been no contract, and the goods could be recovered from the hands of a third party.<sup>3</sup> The distinction is a puzzling one, but in the first case in spite of the fraud the warehouse-keeper did mean to contract with the man who stood before him, and whom he thought was Brown. In the second case the contract was intended to be with Brown and nobody else; the fraudulent letter-writer was non-existent in the seller's mind, and the apparent contract is void throughout.<sup>4</sup>

#### REVESTING OF STOLEN PROPERTY (Section 24)

Where goods have been actually stolen and not merely obtained by fraud and the offender is convicted, then the property in the goods reverts in the owner, notwithstanding intermediate dealings, whether by sale in market overt or otherwise.<sup>5</sup>

#### SELLER REMAINING IN POSSESSION AFTER SALE (Section 25 (1))

'Where a person having sold goods, continues in possession of the goods, then the delivery or transfer by that person of the goods

<sup>1</sup> See page 290.

<sup>2</sup> *Phillips v. Brooks*, [1919] 2 K.B. 243.

<sup>3</sup> *Cundy v. Lindsay* (1878), 3 A.C. 459.

<sup>4</sup> See page 169.

<sup>5</sup> See page 290.

under any sale or other disposition to any person receiving the same in good faith, and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.<sup>1</sup>

This part of the section is intended to promote confidence in commercial dealings; for if the first buyer leaves the goods with the seller, then he must take the risk of his honesty and carefulness. If the seller now sells the same goods again, the second buyer gets the property in the goods, whilst the first buyer can recover damages from the seller.

#### BUYER IN POSSESSION (Section 25 (2))

'Where a person having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods, the delivery or transfer by that person of the goods under any sale or other disposition to any person receiving the same in good faith (and without notice of any lien or other right of the original seller) shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner.'<sup>1</sup>

This subsection operates on lines similar to those in the previous paragraph, and is of particular importance in hire agreements; it will be dealt with fully in the chapter devoted to that subject.

<sup>1</sup> See page 290.

## CHAPTER EIGHT

### THE CUSTOMER'S RIGHTS (FAULTY WORKMANSHIP)

(*Sale of Goods Act* (contd.))

#### NON-DELIVERY (Section 51)

The Sale of Goods Act provides as follows in respect of non-delivery of an order:

'Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller.

'The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.'<sup>1</sup>

The object of this very important subsection is to preclude the injured buyer from recovering losses which neither party could have contemplated at the time the contract was made.<sup>2</sup> If, for example, the non-delivery of an order for *catalogues* occasions the loss of a substantial contract, this damage is not recoverable unless it could be proved that the printer was informed of, and expressly or impliedly undertook to be liable for, the exceptional loss which the trader might suffer from an unpunctual delivery.<sup>3</sup>

#### FAULTY WORKMANSHIP OR QUALITY (Sections 13 and 14)

'Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and that they shall be of a merchantable quality.

'Where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment, there is an implied condition that the goods shall be reasonably fit for such purpose.

'Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.'<sup>4</sup>

In these cases, therefore, the seller is forced by law to guarantee the quality and serviceability of the goods sold, quite apart from any question of negligence.

<sup>1</sup> See page 295.

<sup>2</sup> *Hadley v. Baxendale* (1854), 9 Ex. 354.

<sup>3</sup> *Horne v. Midland Rly.* (1873) L.R. 8 C.P. 131; see also page 161.

<sup>4</sup> See page 287.

## SALES BY SAMPLE (Section 15)

'A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

'In the case of a contract for sale by sample:

(a) There is an implied condition that the bulk shall correspond with the sample in quality.

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(c) There is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.'<sup>1</sup>

## PERFUNCTORY EXAMINATION

In a case which dealt with the question of 'examination' the defendants were desirous of purchasing a quantity of vegetable glue from the plaintiffs who dealt in that commodity. The defendants went by arrangement with the plaintiffs to the warehouse where the glue, which was in barrels, was stored, for the purpose of inspecting it.

Every facility was offered to the defendants for inspection; but being pressed for time, they did not have any of the barrels opened, but merely looked at the outside of the barrels. The defendants purchased the glue, and after it was delivered, they alleged that it was not of merchantable quality.

It was held that the defendants had 'examined' the goods within the proviso to Section 14 (2) of the Act, and consequently there was no implied condition that the glue was of merchantable quality.<sup>2</sup>

## CONDITIONS AND WARRANTIES

These implied conditions are regarded as *going to the root of the whole contract*, and breach of a condition of this kind entitles the buyer to reject the goods, and not merely to claim damages.

A term of a contract which is really *collateral* to the main purpose, and the breach of which does not entitle the buyer to reject the goods, but only to claim damages is called a 'warranty'. This legal definition is far narrower than the trade use of the term, where it usually is equivalent to a 'guarantee' or specific undertaking on the part of the seller, which, if broken, gives the buyer full powers of rejection.<sup>3</sup>

## APPLICATION OF THE STATUTE

To apply these general principles to the printing trade is not altogether easy. Many cases can be brought under the condition of 'reasonable

<sup>1</sup> See page 288.

<sup>2</sup> *Thornett and Fehr v. Baers*, [1919] 1 K.B. 486; see also page 48.

<sup>3</sup> See also pages 48 and 286.

fitness for a particular purpose'. Thus if visiting cards are delivered containing any mistake at all this implied condition has been broken and the customer may reject the goods. On the other hand, the same misprint in a book might not even justify a claim for damages.

#### SUBSTANTIAL PERFORMANCE

The legal doctrine of 'reasonable fitness' in a sale of goods is analogous to that of 'substantial performance' in a contract of work and labour; and the principles governing the right of refusing to pay anything at all for unsatisfactory work which cannot be returned are particularly applicable to contracts for the printing of advertisements or the insertion of matter in a particular publication.

In a very important case upon the point which was decided in 1916,<sup>1</sup> the conclusion of the Court of Appeal was that where work has been done under a lump-sum contract, and the terms of the contract have been departed from, the plaintiff is entitled to recover for his services unless (1) the work he has done has been of no benefit to the customer, or (2) the work he has done is entirely different from the work which he has contracted to do, or (3) the work has not been completed.<sup>2</sup>

The following passage quoted by Mr. Justice Ridley at the first trial sets out the doctrine of substantial performance in a succinct manner:

'If it be said that the condition is that the work shall be done in a proper and workmanlike manner, that is a condition which is implied in every contract of the same kind; and if it were a condition precedent to the plaintiff's remuneration, a little deficiency of any sort would put an end to the contract, and deprive a plaintiff of any claim for payment; but under such circumstances it has always been held that where the contract has been executed, a jury may say what the plaintiff may have.'

#### SALE OF GOODS

Returning now to contracts to supply completed matter, the customer's defence to the printer's claim for payment will ordinarily be that the defects constitute a breach of one of the statutory implied conditions set out above, and that as the Act says these are *conditions* and not *warranties* the buyer is entitled to reject and need not accept the goods subject to deduction for damages.

#### CUSTOM OF THE TRADE

In such a case, if it is sought to be shown by the printer that the alleged implied condition gives no right of rejection and is really a warranty, Section 55 affords a loophole:

<sup>1</sup> *Dakin v. Lee*, [1916] 1 K.B. 567.

<sup>2</sup> But see 'Frustration', page 30.

'Where any right duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage be such as to bind both parties to the contract.'<sup>1</sup>

If a usage applicable to such contracts can be proved by which the buyer is not entitled to reject for errors in the work unless the same are excessive or unreasonable, then provided the matter as printed is held to be a reasonable performance of the contract, the buyer will not be allowed to reject it, but must accept it with an allowance in price in respect of the inferiority.

Such a usage may be held to oust the Common Law rule that where goods are shown to be *in fact unmerchantable*, the fact that they can be made merchantable at a trifling cost does not preclude the buyer from enforcing the statutory condition and rejecting the goods if they do not comply with the terms of the order.<sup>2</sup>

#### 'CLAY v. YATES' AS A DEFENCE

Another loophole is the decision in *Clay v. Yates*.<sup>3</sup> In accordance with the principles of that case the doctrine of 'substantial performance' of a contract of work and labour is applicable, and the statutory conditions of the Sale of Goods Act are not.

<sup>1</sup> See page 296.

<sup>2</sup> *Jackson v. Rotax Motors*, [1910] 2 K.B. 937.

<sup>3</sup> See page 21.

## CHAPTER NINE

### THE CUSTOMER'S REMEDIES

#### (REJECTION AND DAMAGES)

##### (*Sale of Goods Act* (contd.))

An important legal result of the acceptance of goods by a buyer is that thereafter he is compelled to treat any breach of a *condition* of the contract as a breach of *warranty* only; that is to say he is held to have waived his right to return the goods, and in consequence he has only his action for damages for breach of contract (Section 11).<sup>1</sup>

#### WHAT IS ACCEPTANCE? (Section 35)

'The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them; or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.'<sup>2</sup>

#### ALTERNATIVE MEANINGS

Acceptance in performance of the contract is to be carefully distinguished from acceptance in recognition of a pre-existing contract which makes it possible to dispense with written evidence of the contract.<sup>3</sup>

As to acts inconsistent with the ownership of the seller, any resale or attempted resale by the buyer is strong evidence of acceptance.<sup>4</sup> When goods have been retained, the question of lapse of reasonable time is a question of fact and not of law, and must be determined by the individual circumstances of each particular case (Section 56).

#### NO DUTY TO RETURN REJECTED GOODS (Section 36)

'Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.'<sup>5</sup>

#### EXAMINATION (Section 34)

One of the most serious practical problems on the point of acceptance

<sup>1</sup> See pages 176 and 286.

<sup>2</sup> See page 292.

<sup>3</sup> See page 33.

<sup>4</sup> *Morton v. Tibbett* (1850), 15 Q.B. 428.

<sup>5</sup> See page 292.



arises where goods are delivered to a buyer and not unpacked for a considerable time. Ultimately upon inspection they turn out to be altogether faulty. Has the buyer any remedy?

'Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of ascertaining whether they are in conformity with the contract.'<sup>1</sup>

It has been decided that when goods have been sent on a contract of sale, and the jury find they did not correspond with the sample contracted for, the mere unpacking of them by the buyer will not under any circumstances amount to an acceptance. *A fortiori* if the goods are not unpacked, the mere receipt of them does not debar the buyer from exercising his right of rejection. But *keeping* the goods for an unreasonable time *does* amount to an acceptance.<sup>2</sup>

In determining what is a reasonable time for rejecting goods, the conduct of the seller may be taken into consideration, as where by a subsequent misrepresentation he has induced the purchaser to prolong a trial.<sup>3</sup>

#### DAMAGES INSTEAD OF REJECTION (Section 53)

In any case, as has been pointed out, acceptance does not deprive the buyer of his action for damages for breach of warranty.

'Where there is a breach of warranty by the seller or where the buyer elects, *or is compelled*, to treat any breach of a condition on the part of a seller as a breach of warranty, the buyer is not by reason of any such breach of warranty entitled to reject the goods, but he may:

- (a) Set up against the seller the breach of warranty in diminution or extinction of the price, or
- (b) Maintain an action against the seller for damages for the breach of warranty.'<sup>4</sup>

#### MEASURE OF DAMAGES

The section of the Act dealing with the measure of damages was quoted under the title of 'non-delivery'.<sup>5</sup> The application in the matter of minor defects is, of course, exceedingly difficult, and more often than not the assessment of the damages may be a matter of pure chance.

<sup>1</sup> See page 292.

<sup>2</sup> *Curtis v. Pugh* (1847), 16 L.J.Q.B. 200.

<sup>3</sup> *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438; see also pages 44 and 296 (Section 56).

<sup>4</sup> See page 296.

<sup>5</sup> See page 43.

'The rule of the Common Law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed.'<sup>1</sup>

The fact that it is difficult or impossible to estimate the damages suffered with any accuracy does not disentitle the plaintiff from having them assessed. The plaintiff must prove the damage that he claims, and where his claim is altogether too remote he will only recover nominal damages.<sup>2</sup>

#### DAMAGES CONTEMPLATED

The question of whether the damage which accrued was within the contemplation of the parties, when the contract was entered into, arises once more on the question of misprints. Assuming the omission of the word 'not' in an important clause of a printed agreement, or the insertion or omission of one figure in a price, what is the printer's liability?

Everything will depend upon the particular circumstances of the case. If a loss arises which the printer could not reasonably be expected to foresee he may escape liability.<sup>3</sup>

As to misprints in contracts, however, another principle will often operate. This is that there is always a duty on the plaintiff to mitigate his loss as far as possible, and if he fails unreasonably to do this he loses his right of compensation proportionately.

Thus in the case of a printer's slip in an agreement, it is always open to the parties to the agreement to show what the real agreement was and the Court will rectify it. The plaintiff cannot refuse to do this, and saddle the printer with the *prima facie* consequence of his error.

#### NATURAL CONSEQUENCE OF BREACH OF CONTRACT

Again, the damage complained of must be the natural and probable consequence of the breach of contract, otherwise it will be held to be too remote.

For example, if a medical book is printed, and owing to an error a wrong treatment is administered with disastrous consequences, the damage is too remote to justify a claim against the printer.

#### TWO EXAMPLES

The question of remoteness of damage in a claim by a printer was considered in an unreported County Court decision.<sup>4</sup> Here a railway company lost a parcel of newly-printed matter whilst in transit from

<sup>1</sup> *Robinson v. Harman* (1848), 1 Ex. 850.

<sup>2</sup> *Sapwell v. Bass*, [1910] 2 K.B. 486.

<sup>3</sup> *Horne v. Midland Railway* (1873), L.R. 8 C.P. 131.

<sup>4</sup> *Re Harrison: Nicholson v. L.N.E.R.* April, 1923. Unreported.

he printer to the customer. The type had been broken up and it became necessary to reset it in order to carry out the reprinting. The printers brought an action against the railway company claiming all the expenses to which they had been put by reason of the loss, but the learned judge held that they were only entitled to recover the *value of the goods* lost. The cost of resetting the type was held not to be a *natural and ordinary consequence* of the loss, and therefore not recoverable.

The correctness of this view is unimpeachable, and the case exemplifies the lawyers' cynical tag: 'Good law makes hard cases'.

In another case it was held that this principle did not apply, and therefore the full damages were recoverable. A ladies' tailor contracted with a newspaper proprietor to insert a fixed number of advertisements. The proprietor inserted a part and then ceased. Mr. Justice Kennedy held that the tailor was entitled to damages for loss of expected business, in addition to recovering the cost of the unpublished advertisements, because this was a result which might have been in the contemplation of the defendant.<sup>1</sup>

<sup>1</sup> *Marcus v. Myers and Davis*, [1895] 11 T.L.R. 327; see also page 43.

## CHAPTER TEN

### THE PRINTER'S RIGHTS

#### (INSTALMENT DELIVERIES)

#### (*Sale of Goods Act* (contd.))

THE principles relating to this subject will always be of especial importance to the printing trade. The reason is that a large proportion of prime cost is expended in preliminary work, and the cost of multiplying the output is comparatively small. As a result every buyer of printed matter is bound to anticipate his requirements for as long a period as possible in order to get the benefit of the lowest rate.

If he can avoid it, however, he will not take delivery of the whole at once; and the printer, on the other hand, may be in a position to keep the type set up and not to print off the entire order. But, notwithstanding this, the basis of the quotation was on the footing of distributing the initial cost over the full quantity and there will be a loss unless the whole order is executed.

#### DELIVERY AS AND WHEN REQUIRED

Where delivery by instalments at fixed intervals has been arranged the printer is protected, but difficulties may be looked for where quantities are to be delivered 'as and when required' until the total order has been executed.

Fortunately this problem has been very carefully elucidated within recent years.<sup>1</sup> In this case a contract to buy fifty dozen skins had been placed with the defendants' representative in 1913, 'delivery as required'. Half the quantity was delivered in the following year, and in 1915 the defendants' representative left their employ. The buyers forgot about the contract and ordered more skins elsewhere. In 1917 they discovered the position and requested the delivery of the outstanding half of the old contract, but the defendants refused to deliver the skins, alleging that the contract was no longer in existence.

The County Court Judge held that the buyers had abandoned the contract, or in any case that they had behaved in such a way that the defendants reasonably believed that the contract was at an end, and gave judgment for the defendants.

On appeal to the Divisional Court the buyers relied on the principle that where there is a contract for the sale of goods 'delivery as required', and the buyer does not request delivery within a reasonable time, there is an obligation on the seller, if he desires to cancel the contract, to

<sup>1</sup> *Pearl Mill v. Ivy Tannery*, [1919] 1 K.B. 78.

the printer to the customer. The type had been broken up and it became necessary to reset it in order to carry out the reprinting. The printers brought an action against the railway company claiming all the expenses to which they had been put by reason of the loss, but the learned judge held that they were only entitled to recover the *value of the goods* lost. The cost of resetting the type was held not to be a *natural and ordinary consequence* of the loss, and therefore not recoverable.

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<sup>1</sup> *Pearl Mill v. Ivy Tannery*, [1919] 1 K.B. 78.

give notice to the buyer that if instructions for delivery are not given he (the seller) will cancel the contract.<sup>1</sup>

The defendants, on their side, argued that an inordinate lapse of time was wholly different, and in such circumstances each party was justified in assuming that the matter was abandoned altogether.<sup>2</sup> The Court accepted the latter view and dismissed the appeal.

#### DELIVERY IN A REASONABLE TIME

Not infrequently the position is simply that the buyer is fully aware of his obligations to take delivery, but having been tempted by the lowest quotation he has ordered far beyond his requirements. Possibly he cannot afford to pay for the goods, and the printer believes that unless he sues for his money at once he will be left to his claim as a creditor in bankruptcy.

The following general statement may be of value in these cases:

'Where a contract for sale and delivery of goods "as required" is silent as to time, the law will imply that the specification requiring delivery must be made within a reasonable time after the contract; also that the contract must be completed within a reasonable time after specification, and such reasonable time for delivery may be explained and controlled by a trade custom or usage.'<sup>3</sup>

#### NON-DELIVERY (Section 31)

The section of the Sale of Goods Act dealing with instalment deliveries reads as follows:

'Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

'Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.'<sup>4</sup>

#### NON-PAYMENT FOR AN INSTALMENT

A number of early decisions went on the principle that any refusal to deliver, accept, or pay for a particular instalment was a fundamental breach of contract and entitled the other party to rescind.<sup>5</sup> The

<sup>1</sup> *Jones v. Gibbons* (1853), 3 Ex. 920.

<sup>2</sup> *Freeth v. Burr* (1874), L.R. 9 C.P. 208.

<sup>3</sup> *Ross v. Shaw*, [1917] 2 Ir.R. 367 K.B.B.

<sup>4</sup> See page 291.

<sup>5</sup> *Hoare v. Rennie* (1859), 29 L.J. Ex. 73.

modern tendency, however, is to regard an instalment contract as severable, if this is at all reasonable;<sup>1</sup> but the words of the section control the position:

'It is a question in each case depending on the terms of the contract and the circumstances of the case.'

#### JUSTIFIABLE REPUDIATION

'Where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract.'<sup>2</sup>

#### UNJUSTIFIABLE REPUDIATION

But this is not equivalent to saying that in every case payment for each instalment is a condition precedent to delivery of the next. In one case buyers were receiving instalments of an order for 5,000 tons of steel. A petition for the winding up of the manufacturers of the steel was presented, and the buyers, acting under erroneous advice to the effect that they could not safely pay pending the petition, objected to make further payments then due unless the manufacturers obtained the sanction of the Court, which they asked them to obtain.

The manufacturers decided to regard the refusal to pay as a breach of contract releasing them from further obligation to deliver. In due course a winding-up order was made, and the liquidator brought an action for the price of the steel delivered.

The buyers counter-claimed for damages for non-delivery of the remaining instalments; they succeeded in their claim and were allowed to set off the damages against the payments due.<sup>3</sup>

Here the non-payment by the buyers, though unjustified, was susceptible of a reasonable explanation and such a breach did *not* come within the proposition laid down by Lord Blackburn in his judgment: 'The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it, when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct".'

<sup>1</sup> *Simpson v. Crippin* (1872), L.R. 8 Q.B. 14.

<sup>2</sup> *Bloomer v. Bernstein* (1874), L.R. 9 C.P. 588.

<sup>3</sup> *Mersey Steel Co. v. Naylor Benzon & Co.* (1884), 9 A.C. 434.



## CHAPTER ELEVEN

### THE PRINTER'S REMEDIES

(LIEN)

(*Sale of Goods Act* (contd.))

#### PAYMENT AND DELIVERY (Section 28)

'Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say the seller must be ready and willing to give possession of the goods, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.'<sup>1</sup>

The *right to possession* depends largely on whether the transaction is for cash or credit, and the following passage is a judicial exposition of the difference.

'Where goods are sold, and nothing is said as to time of delivery or time of payment, the seller is liable to deliver them whenever they are demanded, upon payment of the price. If goods are sold *on credit*, and nothing is agreed upon as to the time of delivering the goods, the buyer is *immediately* entitled to possession, and the *right of possession and the right of property at once vest in him*. But the right of possession is not absolute; it is liable to be defeated if he becomes insolvent *before he obtains possession*.'<sup>2</sup>

#### UNPAID SELLER'S RIGHTS (Section 39)

'(1) Subject to the provisions of the Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law:

(a) A lien on the goods (or right to retain them) for the price, while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(c) A right of resale as limited by this Act' (see Section 48).<sup>3</sup>

'(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to, and co-extensive with, his rights of lien and stoppage *in transitu* where the property has passed to the buyer.'<sup>4</sup>

<sup>1</sup> See page 291.

<sup>2</sup> *Bloxham v. Saunders* (1825), 4 B. & C. 948.

<sup>3</sup> See page 294.

<sup>4</sup> See page 293.

**LIEN (Section 41)**

It is not proposed to deal with all the rules and remedies in respect of non-payment which are set out within the Act itself. There is, however, one remedy of such special importance in the printing trade that it requires detailed consideration. This is the exercise of the right of lien over the property of the defaulting buyer, and the sections of the Statute dealing with this right are as follows:

‘(1) Subject to the provisions of this Act the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit,

(b) Where the goods have been sold on credit, but the term of credit has expired,

(c) Where the buyer becomes insolvent.’

‘(2) The seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee for the buyer.’<sup>1</sup>

**PART DELIVERY (Section 42)**

‘Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an *agreement* to waive the lien.’<sup>1</sup>

A mere intention on the part of the seller to waive his lien is not enough to deprive him of this remedy. The waiver must be by *agreement*.

**TERMINATION OF LIEN (Section 43)**

‘(1) The unpaid seller of goods loses his lien thereon

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.’

‘(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment for the price of the goods.’<sup>1</sup>

<sup>1</sup> See page 293.

## DEFINITION OF LIEN

So much, then, for the statutory provisions; it will now be convenient to consider the nature of this remedy in more general terms, and its application to specific sets of circumstances.

'Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied.'<sup>1</sup>

The right is a passive right of detention, and *does not include any right of sale*.<sup>2</sup>

The unpaid seller's lien which is the subject of the sections set out above is only one of a number of applications of the principle. In this case the right arises out of the seller's original ownership, whilst in other cases a lien can be exercised over goods which the person in possession has never owned, e.g. a hotel-keeper's lien over a guest's luggage; and there is a common law principle that *an artificer's lien* may be exercised over an article delivered to a workman, on the improvement of which he has had to bestow trouble or expense.

A servant has no lien upon the property of his master which he has taken into his possession *as a servant*; thus a compositor who sets up type in his employer's office has no lien on the type for his wages.<sup>3</sup>

Where work is done on *credit*, this is *prima facie* inconsistent with the existence of a lien,<sup>4</sup> since the contract is upon the footing that the goods shall pass out of the physical possession of the seller before, and independently of his claim for, payment.

## STATUTES OF LIMITATION

A lien may be exercised in respect of debt which can no longer be recovered by action, owing to the running of a Statute of Limitation (i.e. in the case of a simple contract debt, six years from the time it accrued or was last acknowledged).<sup>5</sup>

## PARTICULAR AND GENERAL LIEN

Failure to appreciate clearly the distinction between these two forms of the remedy has not infrequently caused considerable difficulty.

A *general* lien is one which the law allows in respect of *all sums* due from the owner of the goods to the person in possession of them.

A *particular* lien, on the other hand, extends only to charges incurred *in respect of those goods* which are the subject of the lien.

<sup>1</sup> Halsbury's *Laws of England*, volume xx, page 552.

<sup>2</sup> But see page 59.

<sup>3</sup> *Franklin v. Hosier* (1821), 4 B. & A. 341.

<sup>4</sup> *Raitt v. Mitchell* (1815), 4 Camp. 146.

<sup>5</sup> *Higgins v. Scott* (1831), 2 B. & Ad. 413.

In general, the law does not favour general liens and allows them to be set up only in accordance with a recognised custom or usage (e.g. by solicitors, bankers and stockbrokers), or where there is an agreement, express or implied by a course of dealing, to allow this form of security.

Particular liens, on the other hand, are regarded in a very different light, and the Court is willing to apply the principle in a generous manner in proper cases.

#### PRINTER'S LIEN

In the printing trade the position is frequently that the most valuable chattel of his customer in the printer's possession is an author's manuscript or a set of copper plates for engravings, or stereotype blocks, &c., which have been placed in his hands by the debtor in order that a number of prints may be made.

Now in such cases it is very clear that the printer has a lien *over the books, or over the finished impressions*, and he is entitled to retain them until his account for printing those books or engravings is paid,<sup>1</sup> but the lien extends no further.

#### NO GENERAL LIEN

The printer may not retain the books or prints as security for *other* debts, since this would be an exercise of a general lien. *Nor may he retain the manuscript, or the plates or blocks* from which he has worked (unless he himself manufactured them) as security for the cost of printing or of making the impressions. The reason is that although they are closely connected with the proper subject-matter of the lien, viz. the impressions, yet unless expenses or charges have been incurred in the manufacture or improvement of the plates themselves, they cannot be brought within the principle of particular lien, and it has been held that there is no usage among printers to extend their lien in this way.<sup>1</sup> This at all events is the position at Common Law.

A very old Scottish case is interesting for the dissenting judgment of Lord Moncrieff which draws a distinction between the English law of lien and the Scottish law of retention. It is referred to here for the following passage which is, however, *not* supported by any English cases or text-books:

'It is granted and decided even in England that a printer has retention of a manuscript from which he prints; and why not of stereotype plates, which in general, when used, stand in the place of a manuscript?'<sup>2</sup>

<sup>1</sup> *Bleaden v. Hancock* (1829), 4 C. & P. 152.

<sup>2</sup> *Brown v. Sommerville* (1844), 6 Dunlop 1267.

This very important point has never formed the subject of an English High Court decision. In the opinion of the present writers a considerable body of evidence could be adduced to show the existence of customary lien over manuscript, and undoubtedly any Court would treat Lord Moncrieff's dictum with respect.

Whether the Court would hold the alleged customary lien to be reasonable is an open question, and the point affords an opening to anyone who wishes to bestow his name upon a leading case.

Upon Common Law principles, and apart from a usage of the trade, there is no such lien.<sup>1</sup>

#### SPECIAL AGREEMENT

If, however, the printer can show any specific agreement, or an arrangement evidenced by previous dealings between the parties that the copper plates, blocks, &c., should be retained by him not merely for convenience, but *as security* for any debts whatever, either arising from taking impressions from those plates, or from any other work or transaction, the case is no longer one of an unpaid seller's lien or an artificer's lien arising from the nature of the work, but of security by way of lien as arranged by the parties.<sup>2</sup>

The following extract illustrates the same point:

'In a case affecting the retention of numbering machines by a printer, Mr. Justice Sankey said that lien was either general or particular.

'General lien was not regarded with much favour, and only existed in certain definite cases of which this was *not* one. Particular lien existed in respect of an object *to* which a man had done something. But it did not exist in respect of an object *with* which a man had done something.

'In the case in question, for example, there could have been a lien on the tickets printed; but there was no lien on the machines used for printing them.'<sup>3</sup>

#### LIABILITY FOR CONVERSION

Notwithstanding this legal position as to lien, the practical view must not be lost sight of. This would often be that a printer who, as in the last illustration, was unable to get payment for his tickets, might prefer to retain the numbering machines and to face an action for conversion, so that he might counter-claim for his account in the same action and retain his security meanwhile.

Assuming now that the customer succeeds in his action for conversion and the printer in his counter-claim for the money due, the printer

<sup>1</sup> See page 296, Section 55.

<sup>2</sup> *Marks v. Lahee* (1837), 3 Bing. N.C. 408.

<sup>3</sup> *Master Printers' Federation Circular*, March, 1916.

is liable to pay all the costs of the action except such as are definitely attributable to his counter-claim, and will almost certainly be out of pocket on costs.

If the printer is well advised, therefore, he will, besides unlawfully retaining the machine, be first in the field with his writ for the money due, and thus make sure of his general costs of the action.

#### LIEN ON INSTALMENT

A printer has a lien upon copies of a book for the cost of printing that book, but probably not upon the manuscript, in spite of the passage quoted above.<sup>1</sup> If there are two works and a separate contract as to each, there is no lien on one work for the payment due upon the other.<sup>2</sup>

But the principle of the last case must be cautiously applied. Thus, in one case a printer had a contract to print Dr. Hawker's Commentary on the Bible, a work published and charged for in separate numbers. He had printed 8,750 copies and had delivered 6,000 when the publisher failed. The printer then claimed a lien over the balance until an outstanding account of £300 in respect of the delivered numbers was paid. The assignees in bankruptcy applied for the undelivered copies, tendering only the cost of printing these.

In the course of his judgment Lord Ellenborough said: 'I think the defendant had a lien for the whole balance, *the work being an entire work in the course of prosecution*, upon the same principle that a tailor who is employed to make a suit of clothes has a lien for the whole price upon any part of them.'<sup>3</sup>

#### SALE OF LIEN

Where goods are subject to a lien, the person claiming the lien has no right at Common Law either to sell the goods or to assign his lien. Statutory exceptions arise, however, in respect of innkeepers, carriers, shipowners, dock companies, and vendors of chattels under the Sale of Goods Act, 1893 (Section 48).

The material words of the section are as follows:

'Where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.'<sup>4</sup>

<sup>1</sup> *Brown v. Sommerville* (1844), 6 Dunlop 1267.

<sup>2</sup> *Ford v. Baynton* (1832), 1 Dowl. 357.

<sup>3</sup> *Blake v. Nicholson* (1814), 3 M. & S. 167.

<sup>4</sup> See page 295.

But this will only apply to commercial printing and work of a similar nature. It is certain that a printer's lien over books containing unpublished literary matter would not give him any right to publish.<sup>1</sup>

#### GOODS UNDER LIEN OF THIRD PARTY

Where a person purchases goods from a vendor which turn out to be in the possession of a third party and under a lien exercised by that third party, the purchaser should first require the vendor to discharge the lien, and may then himself pay off the sum claimed, and sue the vendor for the amount.

This position occasionally arises in 'trade work', where a sub-contractor is exercising a lien over the work and the printer who took the order is unable to discharge it. If the outside customer, having acquired the property in the goods by purchase from his printer, now tenders the sum to the sub-contractor for the work on that particular job, the sub-contractor must release the goods, and he cannot claim to keep them as security for the balance of any general account with the printer who passed the work to him.

<sup>1</sup> Bell. Comm. 113, but see 6 Dunlop at page 1278 for the contrary view.

## CHAPTER TWELVE

### LAW OF BAILMENT

#### CUSTODY OF OTHER PERSONS' GOODS

THIS subject cannot be treated even in outline without some analysis of the possible sets of circumstances, and with proper modifications such an analysis will apply to the whole law concerning the custody of other people's goods, or in legal terms the law of 'Bailment'. The owner of the goods is referred to as the 'bailor' and the custodian as the 'bailee'. This chapter deals with the responsibilities of a bailee.

#### THE KINDS OF BAILMENT

It will be found in the main that any particular problem can be relegated to one of the four following classes:

- Involuntary Bailment.
- Gratuitous Bailment.
- Bailment for Reward.
- Liability after return has been demanded.

As a rule an editor's difficulties with his contributors will belong to the first or second class; whilst claims against printers made by editors, authors, publishers or other persons asking for printed work to be done are unlikely to come into the first, though they may well be in any of the other classes.

Editors' and publishers' difficulties usually arise in connection with manuscripts or photographs, sketches, &c., relative to a manuscript, and printers' difficulties are usually in relation to plates sent to them for use on a printing job, though they may also relate to lost or damaged 'copy'.

#### INVOLUNTARY BAILMENT

Under this title we must consider the liability involved where goods are sent without any request by one person to another person who does not make it any part of his business to receive such goods.

For example, in an old case,<sup>1</sup> a man wishing to show a picture to a possible customer, sent it to his house without any previous communication. Whilst lying there the picture was accidentally injured. It was held on these facts that the defendant was under no responsibility for keeping the picture safely.

In such a case, clearly the defendant could claim immunity because he had not only not asked for the picture but, further, in no sense could he be said to 'hold himself out' as a person who received pictures.

<sup>1</sup> *Lethbridge v. Phillips* (1819), 2 Stark 544.



In the next case we come a little closer to the dividing line. Here an author had been asked by the lessee of a theatre to send him a sketch or synopsis of a certain play.<sup>1</sup> Instead of doing this the author sent the *whole* manuscript, which the defendant (the lessee) lost. It was held that no duty of any kind was cast on the defendant by sending him something he had not asked for.

This is clearly the very furthest limit to which the principle can be extended, and we may now compare a set of very similar facts in which the defendant was not held free of responsibility.

#### GRATUITOUS BAILMENT

The two cases last quoted were considered in an action which was tried at a London County Court in 1926.<sup>2</sup>

An author had forwarded the manuscript of two plays to Mr. Bromley Challenor who was then taking a leading part in *Are you a Mason?*<sup>2</sup> which was being performed at the Kingsway Theatre.

Mr. Bromley Challenor acknowledged receipt of the plays, and stated he would read them, but he would like to know what the author's intentions were. Did the author want to put the plays on himself, or did he want Mr. Bromley Challenor to put them on? And added: 'However, will you let me know, and in the meantime I will read the scripts?'

The plays were lost and the author commenced an action for delivery or damages. On behalf of the defendant, Mr. Bromley Challenor, it was contended that there was a trade custom that editors of newspapers were not liable for the return or safe custody of manuscripts sent to them and rejected.

The plaintiff's reply was that Mr. Bromley Challenor's letter was an admission that the 'goods' had been received from the owner, and that he was interested in these plays.

His Honour Judge Scully, in the course of his judgment, said that the letter constituted a promise to read the plays in consideration of having received them and of the prospect of producing them. Hence the defendant was under a duty to take care of the manuscripts, and in the present circumstances was under an obligation to explain how the documents were lost.

It will be seen from this that the case was really regarded as a bailment for reward, the 'reward' being the prospective advantage of production. This put the defendant under a greater duty than if he had been a gratuitous bailee, while, as we have seen, if he had been a mere involuntary bailee he would have been under no duty at all.

But since any producer of plays and most editors do unquestionably hold themselves out as being ready and willing to receive and read

<sup>1</sup> *Howard v. Harris* (1884), 1 Cab. & E. 253.

<sup>2</sup> *Summers v. Challenor*, [1926] June 26, *Law Journal*.

authors' manuscripts of a suitable character, they will rarely be able to claim the complete immunity from any duty of involuntary bailees (and even this status, it is perhaps unnecessary to add, would be no answer to a claim for 'conversion' which would certainly follow if a person destroyed the goods or converted them to his own use).

#### PRINTER AS GRATUITOUS BAILEE AND AS BAILEE FOR REWARD

When any customer leaves goods with a printer, and does not agree to give him anything for looking after the goods, then the printer is a gratuitous bailee. But the consideration which on principle would convert the printer from a gratuitous bailee to a bailee for reward need not be a money consideration at all. Most frequently it only consists of some indirect advantage, such as being allowed to continue to keep the customer's account, or perhaps merely the prospect of future work.

As a rule, however, it appears to have been held that when a customer hands to a printer MSS., blocks, stereos or other articles, and does not at the same time place any order with the printer, then the latter is in the position of a gratuitous bailee, in spite of his indirect advantage.<sup>1</sup>

If an order is now given to the printer, entailing the use of these articles, then until the order is completed the printer is in the position of a bailee for reward. And if again the customer asks the printer to retain the blocks, &c., he becomes once more a gratuitous bailee.

#### *Example of Gratuitous Bailment*

Curiously enough, the printing case of *Bullen* referred to in the foregoing paragraph is one of the most universally accepted authorities on the general law.

A firm of publishers had left a quantity of very valuable engraved plates with the printers after the execution of an order. In accordance with the usual practice these were then stored free of charge, and at some later date the printers alleged that without any negligence on their part the plates had been stolen by some person unknown, and they had been unable to trace them.

The storage was for the convenience of both parties; of the plaintiffs because it cost them nothing, and of the defendants because it increased the likelihood of their getting 'repeat orders'. The decision that upon these facts the printers were gratuitous bailees and not bailees for reward is of no small importance.

It was then contended at the Bar that a gratuitous bailee must show not only that the loss had occurred through no want of reasonable care on his part, but further that the loss happened in some way which he could account for, and that in relation to *that particular matter* proper care had been taken. This latter proposition was dismissed as absurd.

<sup>1</sup> *Bullen v. Swan Electric Engraving Co.*, [1907] 23 T.L.R. 258 C.A.

*Completed Work*

Where the work has been completed by the printer, and the customer does not take delivery, but requests the printer to retain custody without agreeing to pay any sum for storage, then the printer is a gratuitous bailee in respect of the goods.

As soon as the goods are delivered to the customer they are at his risk of course, and questions will rarely arise on the general issue. But if the customer fails to take delivery the position is more difficult.

In these cases both the property in the goods and the risk will pass from the printer to the customer when the job has been completed and the customer has been notified and given a reasonable opportunity of inspecting the completed job.<sup>1</sup>

*Unbound Work*

Special difficulties arise again when a customer places an order with a printer for the printing of a specified number of sheets which are only to be bound up as and when required.

If there are really two contracts, one for printing and the other for binding, then as soon as the printing is done and the customer has been given an opportunity of inspecting the property the risk in the sheets passes to the customer.

But if, as is perhaps more usual, the contract to print and bind is one entire contract, then as each instalment of books is bound, and the customer notified that he may examine them, the risk and the ownership in the books pass to the customer; but the risk in the printed but *unbound* sheets remains in the printer.

In this connection a distinction may well be drawn between cases where the printer supplies the paper in the ordinary way, and special cases where the customer has supplied the paper.

In the first case, if the customer has not delayed his instructions and the printer has accepted the order, then in the event of loss the printer is under an absolute liability to replace, until such time as the risk passes as above.

If, on the other hand, the customer has supplied the paper, then in respect of this part of the risk (i.e. the value of the paper before printing) the printer is only in the position of a bailee for reward, and can claim immunity in certain circumstances which will be examined later.

**EXAMPLE OF BAILMENT FOR REWARD**

A case in the King's Bench Division will now be considered, and contrasted with the one in which a printer was exonerated in respect of the loss of a set of plates.<sup>2</sup>

<sup>1</sup> Sale of Goods Act, 1893, Section 18 (R. 2). See page 288.

<sup>2</sup> *Bullen v. Swan Electric Engraving Co.*, [1907] 23 T.L.R. 258 C.A.

Here a tailor made up seventy marten skins, worth £600, belonging to his customer, into a fur coat. He then wrote that the coat was ready, but the plaintiff being in Scotland and unable to come to London 'owing to the strike', she left the coat in the defendant's care.

The defendant kept the coat in a safe, and every morning it was taken out and brushed and shaken and hung in a showcase ready for the plaintiff when she called. Whilst there it was stolen by expert thieves.<sup>1</sup>

In this case counsel on both sides seemed to agree that the tailor was a gratuitous bailee, but differed on the point of whether he had shown a proper amount of care. The learned judge took a different view. He said that the tailor's duties as a bailee for reward did not cease as soon as the work was done. Those duties continued until the parties had clearly shown that they intended to alter the original relationship between them. Here the defendant might have said 'I shall charge you storage', and the plaintiff might have said 'Will you keep the coat free?' Anything of this kind would have changed the contract between the parties.

But when the defendant merely said, 'Your coat is ready; where shall I send it?' and the plaintiff said, 'I will come for it', there was no change in the relationship. The defendant was guilty of negligence which made him answerable as a bailee for reward, and judgment was given accordingly.

#### EXTENT OF LIABILITY OF GRATUITOUS BAILLEES

Having considered what will in particular circumstances constitute a gratuitous bailee and a bailee for reward, it becomes necessary to define the liability which each incurs.

The principle in regard to a gratuitous bailee is that he is under a duty to exercise such care in looking after the goods as he would exercise in looking after his own goods.<sup>2</sup> If the goods are lost or damaged in these circumstances and he can prove that the damage or loss was not due to his own act or default this is a sufficient answer. For example, if manuscript is accidentally destroyed by fire the bailee will not be liable if he can show that the goods were kept in a proper place, and in the charge of proper persons.

It is sometimes said that a gratuitous bailee is only liable for 'gross negligence', but this is an inexact and unsatisfactory expression, being indeed, as has been pointed out from the Bench, only 'ordinary negligence with the addition of a vituperative epithet'.<sup>3</sup>

<sup>1</sup> *Mitchell v. Davis*, [1920] 27 T.L.R. 68.

<sup>2</sup> *Shiells v. Blackburne* (1789), 2 R.R. 750.

<sup>3</sup> *Wilson v. Brett* (1843), 11 M. & W. 113.

## EXTENT OF LIABILITY OF BAILEE FOR REWARD

When a bailee receives valuable consideration for looking after the goods he is in the position of a bailee for reward and is under a duty to exercise a higher standard of care than a gratuitous bailee. If, for example, he is a printer he will have to show that he exercised all the care and skill that could reasonably be expected from a skilled printer's warehouseman.

It is no longer enough to say that the bailee treated the goods with the same care as if they had been his own. He is now being paid for his services as 'a skilled storekeeper, acquainted with the risks to be apprehended from the character or locality of the storehouse itself. He is under a duty not only to take all reasonable precautions to obviate those risks, but also to take all proper measures for the protection of the goods when such risks had actually occurred.'<sup>1</sup>

There is, however, a limit to the liability of a bailee for reward. Provided he can show that he has exercised all the care that is required, the law does not make him an 'insurer' of the chattels confided to him. But (and this is the distinction from the gratuitous bailee) the bailee for reward must show further *how the loss occurred* and why he should be excused.

He may quite properly put up a defence of inevitable accident, such as fire, and apart from special contract he is under no absolute duty to insure against fire. If, however, he has actually insured, and recovers the insurance money, he will be in the position of a trustee of the money for the owner of the chattel, and is bound to account to him for whatever sum he recovers.<sup>2</sup>

## EDITORS AS GRATUITOUS BAILEES

In regard to editors the trade custom quoted in a previous case will be remembered.<sup>3</sup> In addition, the following statement appears in Halsbury's *Laws of England*: 'In the case of manuscript<sup>4</sup> which is submitted voluntarily to an editor in the hope of its being accepted, the editor is not, in the absence of circumstances showing an acceptance of the manuscript for publication, responsible for its safe custody, and if the manuscript is lost the author cannot recover its value'. In other words, an editor can claim the immunity of an involuntary bailee.

This view might quite conceivably be supported on *conclusive evidence* of reasonable custom, but the attempt to extend the alleged custom in the playwright's case failed completely; and in the special circumstances he was held to be not only a gratuitous bailee, but a bailee for reward.

<sup>1</sup> *Brabant v. King*, [1895] A.C. 632.

<sup>2</sup> *Waters v. Monarch Life Assurance Co.* (1856), 5 El. & Bl. 870.

<sup>3</sup> *Summers v. Challenor*, [1926] June 26, *Law Journal*, and see page 62.

<sup>4</sup> Volume xxiii, page 217.

Even as to editors the present writers are by no means satisfied that the above passage constitutes a complete or sufficient definition of their position on the principles of the law of bailment. The authorities quoted in support of the passage are anything but conclusive and the supposed custom does not seem to have been judicially established as yet. Finally, the oft-repeated caution, 'The editor will not be responsible, &c.', would seem to be totally unnecessary if, even without it, the editor is under no liability whatever. Apart from special warnings of this kind, it would appear that the better view is that the law regards editors as gratuitous bailees.

At the risk of repetition, let it be said that after a loss a gratuitous bailee must show that he had used as much care as a reasonable person would use in protecting his own chattels. This is all he need prove, but evidence must be given of these reasonable precautions.<sup>1</sup>

The defendant need not explain or account for the loss any further; the burden now falls upon the plaintiff to give affirmative evidence of negligence before he can make the gratuitous bailee liable.<sup>2</sup>

#### EDITORS AS BAILLEES FOR REWARD

In respect to editors reference may again be made to Halsbury's *Laws of England*.<sup>3</sup> 'In the case of manuscript which is submitted to an editor in response to an express invitation, or of articles ordered to be written and sent to him for approval, the standard of care required of the editor is that which a prudent man would take of similar property of his own, and if he proves that such care has been taken, the burden of proof has been discharged and *he is not bound* to account for the cause of his loss.'

This it will be seen would merely constitute the editor in these circumstances a gratuitous bailee. The learned author does not suggest that the view is supported by recognised custom, and apart from this it seems impossible to reconcile it with the general law. For example, it conflicts clearly with the principles enunciated in the case where a manuscript had been lost whilst in the custody of Mr. Bromley Challenor,<sup>4</sup> and in the view of the present writers an editor who invites the submission of manuscript is under the greater liability of a bailee for reward.

#### LIABILITY FOR ACTS OF SERVANTS

Again, while a bailee for reward is responsible for the fraud or negligence of his servants or agents, this is only where the act was committed within the apparent scope of their authority, or in the course of their employment.

<sup>1</sup> *Coldman v. Hill*, [1919] 1 K.B. 443.

<sup>2</sup> *Powell v. Graves* (1886), 2 T.L.R. 663.

<sup>3</sup> Volume xxiii, page 217.

<sup>4</sup> *Summers v. Challenor*, [1926] June 26, *Law Journal*, and see page 62.

Thus, where a coachbuilder whilst repairing the defendant's carriage lent him another one to use, and then the defendant's coachman took the carriage out for his own purposes and it was damaged, it was held that the defendant was not responsible.<sup>1</sup>

#### LIABILITY LIMITED BY SPECIAL CONTRACT

Everything that has been said in the matter of the liability incurred by a bailee is subject to the terms of any particular contract, and it is always preferable to define the risks undertaken and those excluded, in this way.

In this connection two points in particular may be mentioned. One is that if the bailee purports to limit his liability by any special notice, he must take reasonable steps to bring that notice to the attention of the customer. Important clauses, in print so small as to be nearly illegible, have not infrequently been held not to be binding.

The other matter is that any limitation of liability must be made at the time when the contract is entered into. Any *subsequent* attempt to limit, or even a subsequent *agreement* to limit liability would be void for one fundamental reason. The customer would be receiving no 'consideration' or return for the benefit that he is abandoning in agreeing to relieve the bailee of his liability, whereas the law requires consideration as an essential element of every contract.

#### ABSOLUTE LIABILITY

Where a person has custody of another person's goods, certain circumstances may arise when in the case of loss or damage no excuse will avail him, and he is under an absolute liability to make good such damage or loss.

If, for example, an editor withholds manuscript from an author after he has demanded its return, or if the editor has improperly used it for his own purposes, then he is under an absolute liability to make good the value of the manuscript, and also to pay damages for the detention.

Again, if a printer retains manuscripts, blocks or plates after their return has been demanded by the customer, he also is absolutely liable for replacement in the event of loss. In certain cases a printer may be working upon paper supplied by the customer, and this, as we have seen, makes him a bailee for reward, and liable for any negligence, but not for inevitable accident. But if the printer *breaks his contract* and does not deliver the paper duly printed within the contract time, then he will be under an absolute liability in respect of such paper.

#### BREACH OF CONTRACT

The far-reaching consequences in the matter of liability which follow upon a breach of contract are well exemplified in the following case.<sup>2</sup>

<sup>1</sup> *Sanderson v. Collins*, [1904] 1 K.B. 628.

<sup>2</sup> *Shaw v. Symmons*, [1917] 1 K.B. 799.

A publisher had entrusted books to a bookbinder to be bound under a contract to deliver within a reasonable time when required. The publisher later requested the bookbinder to deliver the whole of the books when bound, but he failed to deliver them 'within a reasonable time'. The books were subsequently burned in an accidental fire on the bookbinder's premises.

In resisting the publisher's claim for his loss it was contended amongst other points that the defendants were protected by a notice upon their invoices and letter paper that they would not be answerable for loss or damage by fire; and in any event that they were absolved from liability by an old statute<sup>1</sup> whereby 'no action shall be maintained against any person in whose house or building any fire shall accidentally begin, nor shall any recompense be made for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding.'

On each argument it was held that the fact that there was an antecedent breach of contract was sufficient to deprive the defendant of any protection he might otherwise have claimed.

Whatever the conclusions of law drawn in various cases quoted, there can only be one conclusion for the prudent business man, namely, that he ought to insure his own goods with a reputable assurance company against all possible risks, and that he ought further to take out a floating policy to cover his customers' goods.

<sup>1</sup> Fires Prevention (Metropolis) Act, 1774.



## CHAPTER THIRTEEN

### STATUTORY REQUIREMENTS AFFECTING CERTAIN PRINTED MATTER

It is proposed in this chapter to deal with certain requirements that printers and newspaper proprietors or, on the other hand, printers' customers, are under obligation to fulfil. Those affecting printers and newspaper proprietors are briefly the obligation to register certain publications, the obligation to keep copies for a fixed period, the obligation to supply copies to certain public libraries, and the obligation to affix an 'imprint'. Those affecting printers' customers, so far as dealt with in this chapter, are the obligation to publish business names on letter-headings, &c., and the obligation similarly to publish names of directors of companies. Specific requirements under the Betting and Lotteries Act appear in a later chapter.

#### REGISTRATION UNDER THE LIBEL ACT

This duty which was imposed upon newspaper printers and publishers by the Newspaper Libel and Registration Act, 1881, was in the nature of a *quid pro quo* for the special privileges given to newspapers.

The most important of these privileges was that of protection against libel actions in respect of reports of public meetings if published without malice. In addition, no *criminal* prosecution for libel was to be commenced against any proprietor, publisher or editor of a newspaper or any person responsible for the publication of the newspaper without the written fiat of the Director of Public Prosecutions, or Attorney-General.

The registration required by the Act enables a person wishing to take *civil* proceedings in respect of any statement published, to discover immediately whom he should sue. Registration is not required in respect of a newspaper belonging to a joint-stock company.

'Newspaper' is defined as 'any paper containing public news, intelligence or occurrences, or any remarks or observations thereon printed for sale and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six<sup>1</sup> days between the publication of any two such papers, parts or numbers. Also any paper printed in order to be dispersed and made public at intervals not exceeding twenty-six<sup>1</sup> days, containing only or principally advertisements.' This definition is incorporated also in the Law of Libel Amendment Act, 1888.<sup>2</sup> It appears to be intended to embrace what is commonly termed the 'free sheet'.

<sup>1</sup> See page 80 as to extension recommended.

<sup>2</sup> See page 92.

A yearly registration must be made in ~~the~~ form provided, in the month of July, and in the event of failure to register after a further month's grace each printer and publisher of the newspaper is liable to a penalty not exceeding £25. He may also be directed by a summary order to make the return within a fixed time. Wilful misrepresentations or omissions in the return may be punished with a fine of £100.

Any person may inspect the register of newspaper proprietors, and certified copies of entries may be obtained upon payment of a fee. The address of the Registrar of Newspaper Returns is Somerset House, W.C.2. The particulars required are the title of the newspaper, the names and occupations of the proprietors, and their place of business and residence. Changes in proprietorship may be returned to the registry office at any time on the appropriate form. The Act of 1881 does not extend to Scotland.

#### REGISTRATION FOR POSTAL PURPOSES

Special postal rates are allowed in the case of newspapers registered for the purpose at the G.P.O. London, under the provisions of the Post Office Act, 1908.

For this purpose the publication must consist wholly or in great part of political or other news, articles relating thereto, or to other current topics, with or without advertisements. The newspaper must be printed and published in the British Islands at intervals of not more than seven days and must bear the title and date of publication at the top of each page.

Formerly it was a condition that the sheets should not be stitched together, but this is no longer insisted upon.

#### STATIONERS' HALL REGISTRY

The Stationers' Company have at Stationers' Hall, E.C.4, a voluntary register for books and fine art publications. This register is not kept pursuant to any statute, and the entries are simply for the purposes of record, and to provide evidence of the existence of the work on a given date in the event of an alleged infringement of copyright.

A wide range of publications will be accepted, and the words 'Registered at Stationers' Hall' may be added to any registered work. It should perhaps be added that this Register is not in any sense a continuation of the old register of copyright works, but is entirely separate and distinct.

#### COPIES FOR LIBRARIES

The Copyright Act, 1911, requires the publisher of every book, on pain of a fine of £5 and the value of the book, to deliver a complete copy to the British Museum within one month after publication. The

copy is to be finished in the best manner in which the book is published, and to be printed on the best paper on which the book is printed.<sup>1</sup>

Upon receiving a written demand within twelve months after publication from the authorities having the control of certain libraries, the publisher is again bound to supply a copy, and in this case the copy shall be on the paper of which the largest quantity is printed. The libraries having this power are the Bodleian at Oxford, the University Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of Trinity College, Dublin, and the National Library of Wales. In these cases the copy is to be sent at any time within a month after a written demand made within twelve months after publication, or within one month after publication if a demand is made before publication.

The term 'book' includes maps, pamphlets, sheets of music and newspapers,<sup>2</sup> but not second or subsequent editions without alteration.

By a regulation made under the Copyright (British Museum) Act, 1915, a large number of trade publications were exempted, unless as to any particular publication delivery is demanded by the Trustees of the British Museum. The Act of 1915 was repealed, but regulations made thereunder were to be deemed to have been made under the repealing statute, the British Museum Act, 1932.

By regulations issued by the Museum Trustees in 1935, under the Act of 1932, publications wholly or mainly in the nature of trade advertisements need not be sent unless demanded. The regulations also except unless demanded certain other classes of publication, including publications wholly or mainly in the nature of calendars or wholly or mainly in the nature of time-tables of passenger transport services, being publications prepared for local use.

#### PRESERVING COPIES

Every printer is required (by the Newspapers, Printers and Reading Rooms Repeal Act, 1869) to keep for six months a copy of every paper he prints, and to write on it the name and address of the person who employed him. Within this period the printer is bound to produce the copy to any justice of the peace who requires to see it, and the penalty for failing to do so is £20. No proceedings are to be taken to recover penalties under the Act except in the name of the Law Officers of the Crown, and the prosecution must be commenced within three months after the penalty was incurred. It is interesting to notice that this is merely a re-enactment of a section of the Unlawful Societies Act, 1799:

<sup>1</sup> Section 15, page 305, *post*.

<sup>2</sup> *Walter v. Hows* (1881), 17 Ch.D. 708.

IMPRINT (See also Appendix, page 274)

The last of these formal requirements which must be considered was also imposed by the Newspapers, Printers and Reading Rooms Repeal Act. This is that every person printing any paper or book for publication or dispersal is to print his name and his address on the first or last leaf. The penalty for failing to comply, in respect of each copy so printed, is a fine of not more than £5.

This obligation does not extend to certain specified publications, viz.:

Bank-notes, bills of exchange, bonds or any other security for payment of money.

Bills of lading, policies of insurance, letters of attorney, deeds and agreements.

Transfers, assignments and dividend warrants for stock.

Receipts for money or goods.

Court proceedings and papers printed for public authorities.

Parliamentary papers.

Impressions of engravings.

Address cards and business cards.

There is also a general exemption in respect of the printing by letterpress 'of the name, or the name and address, or business or profession, of any person, and the articles in which he deals'; also in respect of any papers for the sale of estates or goods, by auction or otherwise.

Therefore business and address cards, price lists and ordinary commercial catalogues need bear no imprint; and even apart from these statutory exceptions it will be within most people's observation that other printing work of a trivial kind, such as menus and concert programmes, is very frequently produced without imprint. In these cases, although there is undoubtedly the risk of a prosecution, yet the provision that informations may only be laid by the Law Officers of the Crown is a protection against vexatious proceedings.<sup>1</sup>

Every person publishing or dispersing matter printed in contravention of the statute is equally liable to the penalty.<sup>2</sup>

It need perhaps hardly be added that the special value to the community of the Act is in relation to illegal publications of various kinds, since it effectively prevents the indiscriminate broadcasting of such matter emanating from an anonymous source.

A case decided under the old Unlawful Societies Act is authority for saying that a printer cannot recover for his labour and materials unless he has affixed his name to the work.<sup>3</sup> This case was examined in the joint opinion referred to under 'Trade Printers', page 75.

<sup>1</sup> *Key v. Bastin*, [1925] 1 K.B. 650.

<sup>2</sup> *Attorney-General v. Beauchamp*, [1920] 1 K.B. 650.

<sup>3</sup> *Bensley v. Bignold* (1822), 5 B. & Ald. 335.

### PROSECUTIONS

Prosecutions of printers for failing to show their name and address on printed matter that requires it are not infrequent, though many offences occur on which no proceedings are taken by the police because their attention has not been drawn to the omission of the imprint, or because the circumstances are regarded as of no importance from the point of view of public interest. If a piece of printed matter is of a character that is regarded by the authorities as obnoxious, although the author or publisher cannot legally be proceeded against, they may prosecute the printer in the event of his name and address not being shown, though required by the statute. Alternatively, the police may issue a warning to him.

It happens sometimes that they may feel bound to take action where a technical offence of omission has been committed and a member of the public presses for prosecution. For instance, a stationer published a booklet in the nature of a guide to a locality and it bore his name as being the printer although he was not a printer. The police were asked to take proceedings and the printer was fined.

In another case the dispersers as well as the printers were fined. A clothing and supply company had issued a paper headed 'Final notice before proceedings in county court' and their printer's name did not appear on it. The stipendiary magistrate uttered strictures against the issuers of this notice for having gone outside the law and done something for which they had no justification.

As this subject of the imprint requirement is of great importance to all printers and is productive of ever-recurring questions and doubts, the editor has included quotations from the old Statutes in the Appendix, page 274, for those who desire to go into it more fully, and has added a reference to a joint opinion given by His Honour Brett Cloutman (then Mr. Cloutman) and Mr. R. P. Croom-Johnson, K.C. (now Mr. Justice Croom-Johnson), in 1935, at the request of the British Federation of Master Printers.

### TRADE PRINTERS — LIABILITY AS TO IMPRINT

A special difficulty arises from time to time where a printer receives an order which for one reason or another he is unable to execute, and which he then proceeds to sub-contract to a 'trade printer'. Whose imprint should be affixed, and has the trade printer any answer if he is summoned for failing to show his own name upon the work?

In these cases it is usually pleaded that there is a long-standing and admitted custom to affix the imprint of the principal contractor, and *not* that of the sub-contractor who has actually done the work; and it is obvious that any other practice would often give rise to an awkward position between the principal contractor and his outside customer.

A further defence based upon the relation of principal and agent can be set up where the principal contractor owns plant which is fully capable of carrying out the job, and the sub-contractor or trade printer is merely assisting him. Such a defence would, of course, fail in the case of specialised work which was 'given out' because the principal contractor did not possess the requisite type or machinery.

On the same lines it has been held that whenever the principal contractor is only a commercial agent, with no printing establishment of his own, his name cannot be shown as that of the person who printed the work, and the actual printer's name must be shown. The point was dealt with in the joint opinion referred to above. The opinion also examines the question of the printer's right to recover for his labour and materials in the absence of his imprint.

#### CUSTOMERS WHO OBJECT TO IMPRINT

Another difficulty arises from time to time, this being the demand made by a customer for the omission of the imprint. There is no ground for thinking that proof of such a demand would enable the printer to escape penalty for the omission. If the work requires the imprint the printer should point out to the objecting customer that the law requires him to show his name and address and also that no other name and address will meet the requirement. To safeguard himself, however, against a possible attempt by the customer to reject the final job bearing the imprint, which had not appeared on any proof submitted, he should see that his imprint is shown on all proofs. There are always customers who will persist in making themselves 'awkward' on this showing of the imprint, usually because they imagine that the printer is seeking a free advertisement. Where the customer is an advertising agent who has his eye on publicity there is no ground for objecting to his name appearing *in addition to*, but not *in lieu of*, that of the printer.

#### TRADE PRINTERS - LIABILITY AS TO LIBEL, ETC.

The foregoing paragraphs apply strictly to the statutory liability to affix the imprint. But the matter does not stop here in the case of libels, illegal publications, and infringements of copyright.

There can be little doubt that upon a strict interpretation of the law, in each of these cases both firms are liable. Especially in the first two classes of offences, if the matter is obviously objectionable, the sub-contractor or trade printer has no defence. In special cases, however, where a technical offence only has been committed, such as failure to submit matter to the Censor, under the wartime 'Defence of the Realm Act', the sub-contractor may only receive a nominal punishment.

In the case of infringements of copyright slightly different considerations arise, and the innocent printer may often escape with

nominal damages. The following case is of particular interest<sup>1</sup> to trade printers. Here an order was given to print a directory, one part of which contained a piracy. The printer who received the order carried out a part including the title page which bore his own imprint, and this part contained no piracy. Finding he could not complete in the time required, he informed his customer and relinquished the contract. The customer now found another printer who completed the part of work which included the piracy.

The owner of the copyright in due course brought an action against the publisher of the directory, and the printer whose name he found upon the title page. In the special circumstances it was found that the latter had neither 'printed the work' nor even 'caused it to be printed', and he was therefore under no liability.

Apart from these special circumstances, both the contractor and the sub-contractor would undoubtedly have been liable for the infringement, and the question of imprint would only arise as barring the principal contractor from saying that he had nothing to do with the printing, after he had knowingly allowed his name to appear as the printer without making any objection.

#### ELECTION POSTERS

A special liability was imposed upon printers and publishers to a fine of £100 in respect of election bills, placards and posters which fail to bear the name and address of the printer *and* publisher by the Corrupt and Illegal Practices Act, 1883. Any person posting such bills or placards is similarly liable.

Letters, circulars and pamphlets are not included under this Act. If the guilty person is the candidate himself or his election agent, the offence is declared to constitute an 'illegal practice' in his case, making him liable to a £100 fine, and incapable of being registered as an elector for five years.

Subsequent statutes have extended the application of these provisions to Municipal Elections, Elections for Local Boards, Poor Law Guardians, School Boards, and Elections of County Councils.

Although in the case of most of the offences under this Act there are considerable powers of relief where the transgression did not arise from any want of good faith on the part of the candidate or his agent, the Court has no power to grant relief to a printer who fails to print his name upon the specified publications.<sup>2</sup>

It is also an offence under the Act knowingly to publish a false statement of the withdrawal of a candidate at an election, for the purpose of procuring the election of another candidate.

<sup>1</sup> *Kelly's Directories v. Gavin & Lloyds*, [1902] 1 Ch. 631, page 107, *post*.

<sup>2</sup> *Ex parte Lenanton* (1889), 53 J.P. 263.

**BUSINESS NAMES**

(a) *Registration.* The Registration of Business Names Act, 1916, as amended by the Companies Act, 1947, contains important provisions requiring registration of the names of partners of firms and the directors of every company 'carrying on business under a business name which does not consist of its corporate names without any addition'. An appropriate form of Statement of Particulars will be supplied by the Registrar of Business Names, Chancery House, Chancery Lane, London, or Exchequer Chambers, Edinburgh.

The particulars to be furnished to the Registrar are: (a) the business name, (b) the general nature of the business, (c) the principal place of business, (d) in the case of a firm, or of a company to which the Act applies, the present Christian name and surname, any former Christian name or surname, the nationality, the usual residence, and the other business occupation (if any) of each of the partners or directors, (e) in the case of an individual similar particulars, and (f) the date of the commencement of the business if the business was commenced after 22nd November, 1916, or, in the case of a company to which the Act applies, was commenced after the coming into force of the relative section of the Companies Act, 1947.

Any change occurring in any of the particulars registered must be registered within fourteen days.

There is a money penalty for failure to register, and in addition the rights of the defaulter arising out of any contract made or entered into in relation to the business while he is in default are not enforceable by legal proceeding.

(b) *Publication.* In the cases of individuals, firms and registered companies there are also, in addition to the requirements as to registration, specific requirements for disclosure of the true names and nationality of individuals or partners conducting a business, and of the directors of a company, on certain classes of printed stationery on which the name of the concern appears. These classes are trade catalogues, trade circulars, showcards and business letters, and there must be shown on these, in legible characters, (a) in the case of an individual his present Christian name or the initials thereof and present surname, any former Christian name or surname, and his nationality if not British, and (b) in the case of a firm or company, similar particulars of all the partners or directors as the case may be. If the director is a corporation, the corporate name must be shown.

The Board of Trade may by order grant exemption in special circumstances.

The Companies Act, 1929,<sup>1</sup> imposed this obligation (a) on every company registered under the Act or the Acts which it repealed unless it was registered before 23rd November, 1916; (b) on every company

<sup>1</sup> Section 145 (1) and (2).



incorporated outside Great Britain which has an established place of business within Great Britain unless it had established such a place of business before the said date; and (c) on every company licensed under the Moneylenders Act, 1927, whenever it was registered or whenever it established a place of business. The requirement under (c) was similarly stated in the last-named Act, and that Act also requires a money-lender to show, on 'any advertisement, circular, business letter or other similar document', his authorised name and, except in a newspaper advertisement, any name other than his authorised name under which he (and in the case of a firm any partner) was before 1928 registered as a money-lender under the Moneylenders Act, 1900.

The expression 'Christian name' is defined as including a forename, and the expression 'initials' as including a recognised abbreviation of a Christian name. There is also a definition of 'showcards' which seems a narrower meaning than a printer would give it. It means 'cards containing or exhibiting articles dealt with, or samples or representations thereof'.

There is no obligation on the printer in relation to his printing for a customer any work of the four classes above stated, but printers are often asked by customers for guidance in this connection.

There are money penalties for failure to publish true names as required.

The Moneylenders Act, 1927,<sup>1</sup> referred to above, requires a money-lender to show conspicuously in any advertisement, circular, business letter or other similar document issued, his authorised name and (except in the case of an advertisement published in a newspaper) any name other than his authorised name, under which he, and in the case of a firm any partner therein, was registered under the Moneylenders Act, 1900. Companies licensed under the Moneylenders Act, 1927, are also specifically referred to in the Companies Act, 1929, as being under the same obligation as other companies to show particulars with respect to directors in all 'trade catalogues, trade circulars, showcards and business letters'.

<sup>1</sup> See *post*, page 150.

## CHAPTER FOURTEEN

### DEFAMATION

ALTHOUGH important Statutes deal with certain aspects of the Law of Libel, this subject has never been codified, and in the main, therefore, it is recorded in the decided cases.

#### WHAT IS DEFAMATION?

Any statement written or spoken, and any picture or representation which is calculated to bring a person into hatred, contempt, or ridicule is defamatory. In addition to this, any statement made by one person of another which is calculated to injure that person in his profession, trade, or calling is in the same category.

It was held not to be defamatory to describe a rival paper as the *Market Street Evening Ananias*,<sup>1</sup> because the words did not necessarily reflect upon the plaintiff's character. On the other hand, it has been held libellous to say that a newspaper is 'The lowest now in circulation, and we submit that fact to the consideration of advertisers.'<sup>2</sup> Imputations of insolvency are defamatory, as are imputations of unchastity to women. On the other hand, it has been said that implications of incontinency in respect of men are possibly not actionable unless made offensively.

#### INNUENDO

A statement which to a stranger might appear unobjectionable, is none the less defamatory if it contains a secondary meaning which conveys a defamatory interpretation to some particular person to whom it is published.

It will be for the judge to say whether the words are capable of conveying the alleged meaning, and the jury will decide whether this meaning is in fact conveyed.

Thus, if a builder were advised to buy his materials from a British firm whose honesty was unquestionable, this in view of the fact that he was actually purchasing from a foreign firm would contain an innuendo reflecting on the integrity of the latter.

#### INTENTION

Where a statement is in fact libellous, it is not open to the defendant to plead that he intended nothing offensive. Further than this, the writer may prove that he used a name in complete innocence, suppos-

<sup>1</sup> *Australian Newspaper Co. v. Bennett*, [1894] A.C. 284.

<sup>2</sup> *Heriot v. Stuart* (1796), 1 Esp. 437.

ing that he had invented it. If the real owner of the name has any reason to complain, it will be no defence to say that the writer had no idea any such person existed.

The Paris correspondent of a paper made the following comment in the course of an article: 'Whist! there is Artemus Jones with a woman who is not his wife; really, is it not surprising how our fellow countrymen behave abroad?' It was held to be no answer for the defendant to say that he had never heard of a barrister of that name.<sup>1</sup>

In a later case<sup>2</sup> a newspaper published a photograph of Mr. C. and Miss X. with the caption: 'Mr. C., the race-horse owner, and Miss X., whose engagement has been announced.' But Mr. C. was married and his wife claimed damages for libel because, in the circle among whom she was known and was reputed to be C.'s lawful wife, she would after this publication be regarded as his mistress. A jury awarded her £500 and the Court of Appeal upheld the judgment.

The principle laid down in *Hulton v. Jones* was even extended in a recent case<sup>3</sup> in which a real person was referred to and the statement printed about him was true. The action for libel was not brought by him but by another person of the same name, and the Court of Appeal took the view that reasonable persons understood the statement published as being defamatory of that other person.

#### SUGGESTIONS FOR CHANGE OF LAW

It has always been felt that this rule is too harsh. In 1926 a Bill was introduced in the House of Lords to amend it, but had to be dropped as being too far-reaching. In 1927 a simplified and modified measure was introduced but failed to pass into law. Then in 1939, following the introduction of a new Bill in the end of 1938, an announcement was made in the House of Commons that a committee had been appointed by the Lord Chancellor 'to consider the law of defamation and to report what changes in the existing law practice and procedure relating to the matter are desirable'. The 1938 Bill was then under discussion and, in view of the Government's announcement, was withdrawn.

The Committee took evidence during 1939, but its work was held up during the war. Its report, issued in October, 1948, recommended some changes, one being that the definition of 'newspaper' should be extended to include periodicals published at intervals of not more than thirty-six days, and the number of reports entitled to privilege extended. Another was intended to ease the position of an 'innocent' defendant.

#### LIBEL AND SLANDER

A defamatory statement when written may constitute a libel, whilst

<sup>1</sup> *Hulton v. Jones*, [1909] 2 K.B. 481.

<sup>2</sup> *Cassidy v. Daily Mirror Newspaper Ltd.*, [1929] 2 K.B. 331.

<sup>3</sup> *Newstead v. London Express Newspaper, Ltd.*, [1940].

the same statement, if only spoken, would be a slander. The latter does not concern us for the present purpose; it may, however, be said in passing that slander can never be the subject of *criminal* prosecution, whereas libel may.

Slander further is not actionable unless the plaintiff can point to the actual damage he has suffered, as, for instance, loss of employment, whereas in libel the law 'presumes damage'. There are certain strictly limited exceptions to this rule, and in these excepted cases slander is held to be *actionable per se*. The most important of these cases are words imputing misconduct in, or unfitness for a person's calling, and words imputing a crime punishable with imprisonment, and in these cases an action is maintainable without proof of special damages.

#### CIVIL AND CRIMINAL LIBEL

The difference between these offences hinges largely on the question of publication. The law gives a man an *action* for libel on account of the material damage which he is presumed to have suffered. If the statement complained of has not been published to third parties, he cannot have suffered such damage.

A *prosecution* for libel on the other hand is based upon the idea of a possible breach of the peace, to which the person attacked may be supposed to be incited. Clearly this frame of mind is produced quite irrespective of publication to third parties.

The element of truth, or, as it is called, the defence of 'justification', reacts differently on the two classes of cases. In civil proceedings, if the defendant can prove the truth of his statement, he is entitled to a verdict, because the plaintiff has no right to the reputation which has now been taken away. In criminal libel it was formerly said that 'the greater the truth the greater the libel'; since an unpalatable truth is even more likely to bring about a breach of peace than a falsehood.

#### LORD CAMPBELL'S LIBEL ACT, 1843

This statute greatly affected the law of criminal libel. In the first place, a defendant may now plead that his words were true, and if in addition he can convince the jury that publication was for the public benefit, he is entitled to a verdict.<sup>1</sup>

In the second place, a statutory penalty of not more than a year's imprisonment (with or without a fine) is provided for the malicious publication of a defamatory libel; while if the offender knew that the libel was false, he incurs the risk of two years' imprisonment.<sup>2</sup> Threats to publish or to abstain from publishing libels are punishable under the Larceny Act, 1916.<sup>3</sup>

<sup>1</sup> Section 6.

<sup>2</sup> Sections 4 and 5.

<sup>3</sup> Section 31

**LIBELS AGAINST CLASSES OF PERSONS AND DECEASED PERSONS**

A class of persons cannot usually *sue* for libel, but where it is clear that a breach of peace was likely to ensue, a *prosecution* may lie in exceptional cases. For example, in the eighteenth century a prosecution was launched in consequence of a statement that certain Portuguese Jews in London had burned alive a Christian woman and her child, and of the disturbances which had thereupon arisen. The defendant set up the plea that he had libelled no individual, but was convicted notwithstanding.<sup>1</sup>

Again, it is settled law that no action will lie for defaming the character of deceased persons; since, however reprehensible such actions may be, the persons attacked are beyond the reach of material damage. It is certainly claimed sometimes that an 'attack is made on the living through the dead', but this depends entirely on innuendo.

On the other hand, in certain rare cases,<sup>2</sup> where a breach of peace has actually resulted, e.g. a son taking extreme steps to defend the outraged memory of his father, it has been held that a prosecution was justified. The leave of the Attorney-General is required in such a case.

This question received public attention some years ago through certain statements made concerning Mr. W. E. Gladstone, which were publicly and violently repudiated by his sons. The author brought an action for libel, but the defendants pleaded justification and won the day.

**SEDITION**

The law in regard to seditious libels is not applied with severity to-day. It is, however, an offence at Common Law to publish statements calculated to bring into hatred or contempt the Sovereign, the Government, the Houses of Parliament, or the Administration of Justice.

It is also a seditious libel to publish statements which attempt otherwise than by lawful means to bring about the alteration of any matter in Church or State by law established, or to promote hostility between the classes.

Action is only taken by the police in the most glaring cases, and doubtless in the present political condition of the country this is the wisest policy. In 1924 a prosecution for an offence of this kind was started, but was subsequently dropped; and the part played in the matter by the responsible department of the Labour Administration was an important feature in the General Election which followed.

**BLASPHEMY**

It is a misdemeanour to publish words relating to God, Jesus Christ,

<sup>1</sup> *R. v. Osborn* (1732), 2 Barn. 138, 166.

<sup>2</sup> *R. v. Ensor* (1887), 3 T.L.R. 366.

the Bible, or the Book of Common Prayer, *intended* to wound the feelings of mankind, to excite hatred or contempt against the Church, or to promote immorality.

The gist of the offence is the intention to injure public susceptibilities. It is no offence to publish heretical opinions provided the decencies of discussion are respected.

#### OBSCENE LIBELS

This class of offence is of very considerable importance. It is a condition of the qualified protection which is granted to newspapers against attack for libel in respect of bona fide reports of judicial and certain other proceedings,<sup>1</sup> that no obscene matter shall be published.

Quite apart from this, it is an offence to publish indecent books, papers or pictures. But it is clear that matter which in certain publications (e.g. medical books) would be free from offence cannot be tolerated when issued broadcast. The test is this: 'Is the tendency of the matter to deprave and corrupt those into whose hands the publication may fall?'<sup>2</sup>

A contract to print indecent matter is against public policy and unenforceable.

#### CONTEMPT OF COURT

Although not a part of the law of libel, the law dealing with contempt of court as it relates to publishers and printers must be briefly referred to at this stage.<sup>3</sup>

It is a criminal offence punishable by fine or imprisonment to publish *comments* on pending civil or criminal proceedings. Fair and accurate *reports* of the proceedings themselves, on the other hand, are under statutory protection.<sup>4</sup> It is owing to the application of this principle that a newspaper proprietor occasionally finds that his posters and headlines have got him into trouble (as comments), though the paragraph itself is irreproachable.

The jurisdiction of the Courts to interfere with such publication is sparingly exercised, the consideration being whether or not a fair trial will be prejudiced. In the murder trial of Patrick Mahon in 1924 the Courts showed their disapproval of the undue interference in police investigations of certain energetic journalists who had shown undue anxiety to obtain 'copy'.

It appears that as soon as the cause is ended comments may be made, irrespective of any question of appeal. It is said at all events that there is no decided case to the contrary. Another point worth

<sup>1</sup> See page 71, *ante* (Registration under the Libel Act, 1881).

<sup>2</sup> *R. v. Hicklin* (1868), L.R. 3 Q.B. 360. See also Chapter XXI, 'Illegal Publications'.

<sup>3</sup> See Chapter XXIV.

<sup>4</sup> See pages 70 and 92.

remembering is that a newspaper proprietor has no right before a trial to publish the contents of the writ, affidavits and pleadings.<sup>1</sup>

In an action for libel it is not a contempt to continue publishing the statement complained of after the issue of the writ. It is open to the plaintiff to apply for an injunction restraining such publication, but such an application is commonly refused unless the attacks are of the grossest and most unjustifiable nature. But although the plaintiff may quite rightly be refused his remedy before the trial, yet if he obtain a verdict the defendant's act in persisting in publishing the libel will be regarded as a serious aggravation of the offence when damages are being assessed.

#### SLANDER OF TITLE AND TRADE LIBELS

There are many statements which while not strictly libels are none the less actionable as tending to injure the plaintiff in the way of his trade.

A well-known case<sup>2</sup> is that of a boilermaker who died leaving his business to his son. A newspaper published a statement to the effect that the concern had ceased to exist, and was held liable for damages. In regard to such actions it must be proved, first that the statement was untrue, and secondly that actual damage has accrued. General loss of business by reference to the books will suffice without evidence of the loss of particular customers.

Mere puffing of one's own goods is not actionable, even though it is stated incidentally that such goods are superior to any other trader's. Otherwise, as it has been said,<sup>3</sup> the Courts would be turned into machinery for advertising rival productions by pronouncing judicial decisions on their merits. In that case the defendant sold the plaintiff's 'infant food', affixing his own label to the wrapper, which recommended *his own brand* as being 'far more nutritious and healthful than any other preparation yet offered'.

Where this offence is to be made out 'malice' must also be proved, but the word is here used in the restricted sense of 'malice in law', which exists whenever a wrongful act is done intentionally without excuse, and is quite different from malice in the sense of 'spite'.

#### INJURIOUS FALSEHOOD

The considerations affecting this topic are very similar to those dealt with above. In a recent case a music-hall proprietor published of a pianist that she would appear at that hall during a certain week. The statement, though made bona fide, was untrue, and in consequence an

<sup>1</sup> *R. v. Madge*, [1913] 30 T.L.R. 10.

<sup>2</sup> *Ratcliffe v. Evans*, [1892] 2 Q.B. 524.

<sup>3</sup> *White v. Mellin*, [1895] A.C. 165.

offer of another engagement was not made to her. In the action which followed it was held that in the absence of any malice the plaintiff could not recover.<sup>1</sup>

#### INDEMNITIES

A somewhat different problem arises when commercial competition is close, and trade feeling runs high. In these circumstances a printer or editor will often be asked to reproduce matter which he feels is on the border line, and dangerous. He must bear certain points in mind continually. When he is asked to unmask a fraud the first question is whether the matter is of public concern, so that his exposure will benefit the public. The next point is whether malice (i.e. spite) exists in the mind of the writer, or whether the statement is fair comment.

An editor or printer may in these circumstances be offered an indemnity in respect of the risk, or a publisher or printer may demand such an indemnity from his author. The publisher should remember that in agreeing to do an unlawful thing (the publication of a libel) he is not giving any consideration which would entitle him to enforce the other part of the contract (payment of the indemnity).

Where one of the parties concerned in publishing a libel has acted in innocence he may find an indemnity granted to him by another party is of some legal value under the Law Reform (Married Women and Joint Tortfeasors) Act, 1935, and not merely a 'gentleman's agreement'. Before that Act, a promise by, say, a publisher to indemnify his printer against any damages for which he might be held liable would not be enforceable. The Act, in Section 6, declares that, while it will have no effect to render enforceable any agreement for indemnity that would not have been enforceable apart from the Act, yet a guilty tortfeasor is prevented from recovering contribution from an innocent one whom he has contracted to indemnify.

#### ASSESSMENT OF DAMAGES AS BETWEEN JOINT DEFENDANTS

The Law Reform (Married Women and Joint Tortfeasors) Act, 1935, altered the position substantially in regard to damages that may be payable by two or more tortfeasors (i.e. wrongdoers). This affects *inter alia* persons who jointly commit libel or infringe anyone's copyright and, consequently, in the case of libel there is room for discrimination as between author, publisher, printer and any others concerned in the libel when it comes to the assessment of liability for damages.

Whereas formerly all the defendants in a libel action were in all cases equally liable for the full amount of any damages awarded and the plaintiff could recover the amount from any one of them without that one being able to claim 'contribution' of any part of the amount from any other defendant, the Act of 1935 makes it possible for an innocent

<sup>1</sup> *Shapiro v. La Motta*, [1923] 30 T.L.R. 201.



person called upon for payment to recover such contribution from other defendants. The Act also allows the Court to fix the amount of such recoverable contribution on the basis of what is just and equitable having regard to the extent of the responsibility of the person sued for contribution, and even 'to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity'.

It is common knowledge that a printer is often singled out by a plaintiff from among several defendants for payment of damages awarded against all of them, and it can be said that the Act of 1935 has greatly improved his position by enabling him to claim something from the others.

The power given to the Court to discriminate between one defendant and another in accordance with its views as to their relative degrees of responsibility is also favourable to the printer seeing that he may often be in the position of being able to show that the printed matter forming the ground of action was not *ex facie* defamatory.

This Act of 1935, although it is referred to here specially in relation to libel actions, has application, not only to liability among joint defendants in libel actions, but also to liability among joint tortfeasors in general and is therefore very relevant to cases where there are joint tortfeasors in actions for infringement of copyright or in actions for damages in respect of personal injuries.

It has been held that the judge at the close of the trial has jurisdiction under Section 6 of the Act to apportion the damages between joint defendants found liable without the necessity of a separate proceeding for that purpose.<sup>1</sup>

#### INSURANCE

The question of indemnity is closely connected with that of insurance. Insurance against accidental wrongdoing is enforceable, but the law will not allow deliberate wrongdoing to be protected. Insurance companies do not normally undertake insurance against the results of libel or infringement of copyright, but it is possible for printers to obtain insurance protection from Lloyd's Underwriters, premium rates being based on the printer's or publisher's recent history as to claims made against him and the nature of the publications for which cover is desired. Such cover can be relied upon, at least so long as the wrongdoing is not deliberate.

#### PUBLICATION

The offence of Defamation is not complete without *publication* to some third party except in criminal libel. In printed libels publication is usually necessarily admitted, but the question is more difficult when

<sup>1</sup> *Croston v. Vaughan*, [1937] T.L.R. 54.

it arises in relation to manuscript and correspondence received by an editor or publisher.

Technically a libel is 'published' if 'copy' containing such matter is sent to an editor for perusal, but it has been said that such publication alone would not sustain a verdict. Where a letter, however, was dictated to a stenographer and sent to the plaintiff's office where it was opened by one clerk and read by two other clerks, this was held to be sufficient publication.<sup>1</sup> In subsequent decisions this case was distinguished on the ground that these were not ordinary incidents of business.

Similarly, although a printed libel may not be circulated, yet the printer and the publisher are both liable for the publication to the compositors and other workmen.<sup>2</sup>

But this cannot be relied upon as a universal principle, and as soon as any question of privilege arises it is certain that the protection will cover all the usual course of business.<sup>3</sup> Even apart from this the Courts seem averse from applying the law laid down in *Pullman v. Hill*, for in another case where an inquisitive butler opened his master's letter and read the offensive matter there was held to be no publication.<sup>4</sup> In this case the envelope was unsealed and bore a halfpenny stamp, and it was argued without success that it should be regarded as a post card.

Merely to deliver a libel which is not read is not publication, and just as the writer's intention is immaterial as against the actual effect produced,<sup>5</sup> so, conversely, if no effect is produced (e.g. the libel is not understood) it is submitted that there is no publication.

Accidental publication is not infrequent, and this may or may not afford a defence according to the measure of blame or negligence attributable. Thus where a dissolution of partnership was inserted under a heading of 'bankruptcies', £50 damages were obtained, although a full apology had subsequently been made.<sup>6</sup>

#### REPETITION

It is never a defence in either libel or slander actions to plead that the defendant was only repeating another's statement. Each repetition is a fresh publication, although special circumstances may exist which will, to some extent, mitigate the defendant's liability. On the other hand, a defendant is not liable for unauthorised repetitions of his own statement, and such publication is no evidence against him.

<sup>1</sup> *Pullman v. Hill*, [1891] Q.B. 524.

<sup>2</sup> *Watts v. Fraser* (1837), 7 C. & P. 369.

<sup>3</sup> *Edmondson v. Birch*, [1907] 1 K.B. 371.

<sup>4</sup> *Huth v. Huth*, [1915] 3 K.B. 32.

<sup>5</sup> *Hulton v. Jones*, [1909] 2 K.B. 481, page 80, *ante*.

<sup>6</sup> *Shepherd v. Whittaker* (1875), L.R. 10 C.P. 502.

**PERSONS LIABLE ON PUBLICATION OF LIBEL**

In the ordinary course of events, therefore, in a printed libel a number of persons may be liable – the author, the editor, the printer, the publisher, and the vendor, and, in the case of a newspaper, the owner. Proprietors are as much liable as their servants. While no one can defend himself by showing that he committed an unlawful act under the order of another person, such other person is also liable for the acts of those he employs, provided the acts are within the scope of their employment. In a case of *criminal* libel, however, it is a good defence to show that publication was made without the defendant's consent or knowledge, and did not arise from want of due care on his part.

**AUTHOR, PUBLISHER AND PRINTER**

Nor is it any answer to an action for libel to show that upon publication the defendant disclosed the author's name<sup>1</sup>; and in fact an editor who wishes to shield his contributor is under no obligation whatever to give this information.<sup>2</sup> But where a defendant was sued as proprietor and publisher of a newspaper printing a libel, the printer's name not having been disclosed, the defendant was ordered to answer an interrogator asking the name of the printer.<sup>3</sup>

Where the printer and the editor of a magazine are both sued for a libellous illustration contained in the magazine, then if the printer can show that he did not print the illustration he is only liable if the illustration is referred to in the letterpress.<sup>4</sup>

**BOOKSELLERS**

But although the law in the matter of repetition of libel bears somewhat hardly upon the trades concerned, a reasonable measure of relief is afforded to newsvendors and the like, who cannot reasonably be required to read all the contents of the publications they retail.

In the leading case on the point<sup>5</sup> it is said that persons whose part in disseminating the libel was purely subordinate cannot be held liable if they can show that they did not know the contents, that there was nothing which ought to have led them to suspect that a libel was contained, and finally that it was not owing to any negligence that they did not know of the libel.

In another case<sup>6</sup> where a lending library continued to circulate a book after an action of libel had been successfully fought in respect of

<sup>1</sup> *De Crespigny v. Wellesley* (1829), 5 Bing 392.

<sup>2</sup> *Gibson v. Evans* (1889), 23 Q.B.D. 384.

<sup>3</sup> *Hillman's Airways Ltd. v. Société Anonyme d'Éditeurs Aéronautiques Internationales*, [1934] 2 K.B. 356.

<sup>4</sup> *Watts v. Fraser* (1835), 7 C. & P. 369.

<sup>5</sup> *Emmens v. Pottle* (1885), 16 Q.B.D. 354.

<sup>6</sup> *Vizetelly v. Mudie's Library*, [1900] 2 Q.B. 170.

matter therein, it was held that the principle laid down in *Emmens v. Pottle* could not be extended to exculpate the proprietor.

#### REFUSAL TO PRINT LIBEL

The existence of libel is often only discovered by the printer after he has done, or partly done, his work of setting, even though he has used care in reading before he accepts the job. It may be difficult, and even impossible, to ascertain at the time of taking an order whether the copy contains libellous matter. If he finds libel he will wish to refuse the job, and a question may arise as to whether he is safe to repudiate his contract to print.

Normally it is for the law courts to say whether libel is present or not, but if the printing was held up pending a legal decision, and the decision was that there was no libel, the printer might have to compensate his customer for having refused or delayed to proceed with the work according to contract. To meet this difficulty, the Standard Conditions of the printing trade were amended some years ago to give the printer the right to be the judge of whether something in his copy is libellous or not and to refuse to print if he thinks he sees libel. The Standard Conditions should, of course, have been brought to the customer's attention at the time the order was taken.<sup>1</sup>

<sup>1</sup> See Standard Conditions, page 28.

## CHAPTER FIFTEEN

### DEFENCES IN LIBEL ACTIONS

THE principal defences to an action for libel may be considered separately under three headings – ‘Justification’, ‘Fair Comment’ and ‘Privilege’. There is no such thing as a defence that no libel was intended. The Court is only concerned with the statement laid before it; the criterion is not what the defendant was thinking but what the world will think. Similarly it will be no defence to say that the writer did not intend to refer to the plaintiff, if reasonable people will suppose that he did so intend.<sup>1</sup>

#### JUSTIFICATION

For *any* defence to be successful the truth of material statements of fact must be established, but a defence of ‘justification’ implies more than this. It is a specific counter-attack and an absolute persistence in the defamation. The word must not be taken in its ordinary sense of a person being warranted in making the assertion. It means that the defendant takes up a legal stand on the words complained of, and says that, however defamatory they are, the words are true and he intends to prove it.

No withdrawal, apology, or mitigation of damages is compatible with this defence, and, further, it must be proved to the hilt. If it is not so proved the Court will consider the ‘unjustifiable’ attitude of the party and will award exemplary damages. On the other hand, if the defendant can make good his statement he will be protected, not because it is right to make the exposure, but because the law considers that the plaintiff has no right to complain if he loses a reputation to which he is not entitled. For these reasons it is usual to give a warning that the plea of justification, though right at times, is a dangerous one.

#### FAIR COMMENT

A very common method of drafting a defence of this kind is to say ‘that in so far as the words complained of consist of statements of facts they are true, and in so far as they consist of statements of opinion they are fair comment on a matter of public interest’.

This plea is regarded in law as raising the defence of fair comment only, since the general truth of the facts alleged must always be proved.

In the first place the subject-matter must be one of *public interest*. No one is warranted in urging this plea if he has maliciously given

<sup>1</sup> *Hulton v. Jones*, [1909] 2 K.B. 481; see page 80, *ante*.

publicity to some purely private occurrence. But everyone who takes part in public life must be taken to invite a certain degree of criticism of his conduct and work.

All matters of public administration and the public conduct of those who take part in them are thus open to comment. The same is true of other matters which invite public attention, such as entertainments, publications, architecture and so forth. A case is even reported where the plea was admitted in respect of a money-lender's conduct of his business.<sup>1</sup>

In the second place the criticism must be *fair* comment. This does not mean that it must necessarily be accurate, or that the jury would have held the same view. But it does mean that it must not be inspired by motives of ill-will.

'Malicious criticism inspired by personal hostility can never be fair comment' as the principle was succinctly stated in a leading case; and again, 'criticism must not be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact'.<sup>2</sup>

It can never be justifiable to impute corrupt motives for acts of public servants without specific evidence. On the other hand ridicule and the most stinging satire when properly directed at a proper object may proceed unchecked. A book has been reviewed as 'the very worst attempt at a novel that has ever been perpetrated', with other scathing comment. An action was brought, but not fought to a conclusion. So long as the critic does not go beyond criticism, so long and no longer can he count on protection.

There is even now some doubt as to the effect of a finding by a jury 'that the words complained of were defamatory, that they were true, but they were not fair comment', with an award of damages.

This was the finding in a recent action concerning a book on *Birth Control* by Dr. Stopes. The trial judge found that since the words were true, judgment must be for the defendant. The case went to the Court of Appeal, and, ultimately, to the House of Lords. The Court of Appeal reversed the judgment on the ground that the jury had found that the words were not fair comment, and gave judgment for the plaintiff.

The House of Lords restored the original finding, but the legal position was made no clearer, as it was said that there was no evidence on which the jury could base their finding that the comments were in fact unfair, and this part of the verdict therefore had no effect.<sup>3</sup>

<sup>1</sup> *Gray v. Labouchere*, [1911] 7th December, *Times* Newspaper.

<sup>2</sup> *McQuire v. Western Morning News*, [1903] 2 K.B. 100; *Merivale v. Carson* (1887), 20 Q.B.D. 275.

<sup>3</sup> *Sutherland v. Stopes*, H.L., [1925] 41 T.L.R. 106.

### PRIVILEGE UNDER STATUTE

The law of privilege as regards *the press* is largely contained in the Law of Libel Amendment Act, 1888. This is merely a statutory application to one part of the community of the principle that there are frequent occasions the very nature of which demands that that which was said or written in the performance of duty, or under some analogous obligation, should be protected.

This protection or privilege is considered under two headings: 'absolute privilege' and 'qualified privilege'. The distinction is this, that whereas the immunity of qualified privilege is lost as soon as a malicious motive for making the statement has been proved, in the case of absolute privilege the question of malice is immaterial.

It is for the judge to say whether an occasion was in fact privileged, while the jury will decide the question of malice as and when this consideration arises.

The Act of 1888 does not extend to Scotland.

### ABSOLUTE PRIVILEGE

It is no doubt common knowledge that no observation or statement made in the Houses of Parliament can be made the subject of an action for defamation. This is the reason of the challenge sometimes flung by one honourable member at another honourable member in which the latter is invited 'to repeat some remark outside'.

In addition to this, as the result of litigation over a hundred years ago between a person who regarded himself as injured and Hansard, the official publisher of Parliamentary reports,<sup>1</sup> the Parliamentary Papers Act, 1840, was passed, giving absolute privilege to papers published by the orders of either House.

All statements written or spoken in the course of proceedings in Courts of Law enjoy the same protection.<sup>2</sup> It should be observed, however, that while this does not extend to proceedings before licensing justices, it does cover courts-martial and coroners' courts.

Many official statements such as communications made between Government departments and in the course of naval, military and civil administration, are similarly subject to absolute privilege.

As regards newspaper reports, the position is a little anomalous. Reports of *Court proceedings* enjoy *absolute* privilege, provided they are fair and accurate, are published contemporaneously and no blasphemous or indecent matter is published.<sup>3</sup> The Judicial Proceedings (Regulations of Reports) Act, 1926,<sup>3</sup> cut away a large part of this protection, by prohibiting the publication of detailed reports of divorce cases.

<sup>1</sup> *Stockdale v. Hansard* (1839), 9 Ad. & E.I. 1.

<sup>2</sup> Law of Libel Amendment Act, 1888, Section 3.

<sup>3</sup> See page 242.

On the other hand, the law only extends a *qualified* privilege to reports of *public meetings*, and in view of this narrow distinction it is not easy to avoid confusion.<sup>1</sup>

#### QUALIFIED PRIVILEGE

This form of immunity can be claimed, it will be remembered, in certain circumstances unless and until the plaintiff can show actual malice. On sufficient proof of this the defence of privilege breaks down. It will be convenient to discuss Section 4 of the 1888 Act first, and then proceed to the general question of common law qualified privilege.

In the first place, this statutory protection does not apply to all publications, but to newspapers only, and not magazines or monthly trade papers. The Act adopts the definition of 'newspaper' that is given in the Act of 1881.<sup>2</sup> It applies to *reports* of public meetings, and not to journalists' comments. Meetings of *public bodies* where the public itself is excluded, and reporters are not admitted, are not included. Apart from this, the section contemplates all meetings of boards or local authorities formed under any Act of Parliament, meetings of Commissioners, select committees of Parliament, and justices of the peace in quarter sessions assembled for administrative or deliberative purposes.

The term 'public meetings' is defined in the section as meaning any meeting bona fide and lawfully held for a lawful purpose, and for the furtherance of any discussion of any matter of public concern, whether the admission thereto be general or restricted.

#### REPORTS

The report must be fair and accurate, and contain no indecent or blasphemous matter. In addition, the matter published must be of public concern, and for the public benefit.

Thus, where the report of a meeting of dock labourers included derisive personalities made by members of the audience concerning a speaker, the protection of Section 4 was held not to be extended.<sup>3</sup>

It is perhaps necessary to observe that headlines are not protected, and that care should be taken to ensure that both these and the posters do not give a false impression to the public.

Again, just as the law presumes a man innocent until he is proved guilty, so the law does not presume a crime or wrong to have been committed until the verdict has been given. For this reason it is better to speak of an 'alleged' libel or an 'alleged' crime when reporting judicial proceedings that are yet pending.

<sup>1</sup> Law of Libel Amendment Act, 1888, Section 4.

<sup>2</sup> Newspaper Libel and Registration Act, 1881, Section 1; and see page 70.

<sup>3</sup> *Kelly v. O'Malley* (1889), 6 T.L.R. 62.



The statutory privilege extends to the actual proceedings only, and not to documents in the proceedings. A reporter who may have obtained any such documents with a view to saving trouble must be exceedingly careful not to incorporate matter which would not have otherwise appeared in his shorthand notes.

#### PRIVILEGE LOST

Once the statutory privilege is established, it can be lost in two ways only. In the first place, the Law of Libel Amendment Act, 1888, provides that the statutory plea of privilege affords no defence in cases where the defendant was requested to insert a contradiction or explanation of the report complained of, and refused or neglected to insert the same.<sup>1</sup>

In the second place, there is no protection where the report was made maliciously; and a similar provision applies to the publication of *extracts* from Parliamentary papers, as opposed to the publication in the first place of those papers themselves, which enjoys absolute privilege.<sup>2</sup>

#### QUALIFIED PRIVILEGE AT COMMON LAW

Many *prima facie* defamatory statements which do not come within the statutory privilege are protected on more general grounds. For example, a letter written 'for the defence and protection of a man's interests and rights, and without malice, is privileged, although it may impute dishonesty.'<sup>3</sup> When anyone is attacked in public, he is entitled to defend himself with the same publicity. There is a similar privilege in the case of statements made in the 'discharge of some public or private duty'; and again privilege attaches where there is 'an interest common to the person who makes the statement, and to the person to whom he makes it'. Finally, statements made with the object of redressing public grievances, or preventing or punishing crime, are also protected when made *bona fide* and without malice.

The defence of privilege based on the 'discharge of a duty' was exemplified in a case where a trade information bureau was concerned. The business of this organisation was to make inquiries as to the credit, means and commercial reputation of persons whose names were submitted. Following on one unfavourable report, the secretary found himself sued for libel, but his plea of 'publication on a privileged occasion' was very properly upheld.<sup>4</sup>

Very similar facts were also considered in relation to the plea of 'common interest'. In the last case the body was simply an association

<sup>1</sup> Section 4.

<sup>2</sup> Parliamentary Papers Act, 1840.

<sup>3</sup> *Coward v. Wellington* (1836), 7 C.P. 536.

<sup>4</sup> *London Association for the Protection of Trade v. Greenlands*, [1916] 2 A.C. 25.

of traders for the purpose of protection, the offices were maintained by subscriptions, and no profit was looked for. In another case where the organisation was independent, and carried on for the purposes of profit, there could be clearly no common interest between those who made the inquiries and those who supplied the information, and the statements were therefore not protected.<sup>1</sup>

Another example of 'common interest' arose in connection with a defamatory statement contained in the monthly circular published by a railway company to its servants. This periodical contained the name and circumstances of dismissal of one of their guards. The ground of dismissal being neglect of duty, it was held that the company had a common interest with their servants in making known the information.<sup>2</sup>

It must be carefully remembered that in all these cases of qualified privilege the protection is destroyed by malice. The very fact of publication to an unduly wide circle may be sufficient to establish malice; and in those cases where in fact there is no common interest, nor any duty to be discharged, it is quite useless for the defendant to say that he believed the contrary.

In regard to statements made to redress public grievances, and for the purpose of repressing crime, these are only protected when made to the proper person or authority, e.g. the head of a department of the public service.

#### APOLOGY

Just as on the one hand the law regards the plea of justification, when not made out, as an aggravation of the original libel, so it provides that where a proper apology has been tendered this may be pleaded in mitigation of damages. But there is an absolute condition to this statutory plea, and that is that a sum of money be paid into Court at the same time.<sup>3</sup>

In the case of other actionable wrongs, a sum of money can be paid in this way, and at the same time liability may be denied. In the case of libel the liability must be admitted. The jury, however, must not be told of the fact of payment, and breach of this rule by plaintiff or his counsel is a sufficient ground for a new trial to be ordered.

There are two additional points to be noticed where the libel apologised for was contained in a newspaper or other periodical publication. The first of these is that the libel must have been inserted without actual malice or gross negligence. The second is that the apology must have been published either in the same newspaper at

<sup>1</sup> *Macintosh v. Dun*, [1908] A.C. 390.

<sup>2</sup> *Hunt v. Great Northern Railway*, [1891] 2 Q.B. 189 (O.).

<sup>3</sup> Libel Act, 1845, Section 2.

the earliest opportunity afterwards, or in the case of periodicals appearing at intervals exceeding one week, in any other publication selected by the plaintiff.<sup>1</sup>

It must be remembered in this connection that the jury may find an apology was inadequate; it need not be abject, but it is dangerous to make reservations. The defendant's best plan at all times will be to allow his solicitor to draft the apology for him.

Another statutory plea in mitigation of damages is open to newspaper proprietors who can show that the plaintiff has recovered damages or compensation in another direction for a libel which is to the same effect as the one on which the present action is grounded.<sup>2</sup>

In the matter of libel generally, as in all matters which are left to juries to decide, it is impossible to obtain exact criteria, and apart from this consideration much depends upon public opinion at different times and places. For example, the following dictum of the Supreme Court of Georgia may be regarded by some as perfectly reasonable, but there will always be others who disagree with it:

'When the name of Washington shall grow cold to the ear of the patriot, when the Poles of the earth shall swing round to a coincidence with the Equator, then and not till then will it cease to be a libel to call a man a Tory.'<sup>3</sup>

<sup>1</sup> Libel Act, 1843, Section 2.

<sup>2</sup> Law of Libel Amendment Act, 1888, Section 6.

<sup>3</sup> *Giles v. The State* (1849), 6 Cobb 284.

## CHAPTER SIXTEEN

### COPYRIGHT

THIS section of the law is embodied in the Copyright Act, 1911. Certain references to other statutes which deal with kindred subjects, such as the Patents and Designs Acts, 1907 to 1946, will have to be made, but generally speaking, the 1911 Act and judicial decisions on the subject-matter together form the authority.

Certain aspects of copyright law have already been referred to in Chapters Two and Three.

#### DEFINITION OF COPYRIGHT

The first section of the 1911 Act lays down the area of the operation of copyright as being, 'in every original literary, dramatic, musical and artistic work'; and copyright as being 'the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever', and the essence of the subject lies in this statutory definition.

#### ORIGINALITY

No work can claim protection which is not original, and one of the principal difficulties in the application of the law is this very point. Piracy is comparatively easy to detect when the work infringed is entirely new, but it is a different question when reference to common sources is essential to the very nature of the work. In these cases clues can sometimes be discovered in errors which arose in the first transcription, and which have subsequently been copied.

The Act provides in terms that compilations are 'literary works',<sup>1</sup> and in proper cases even these will be regarded as original. Some years ago *Pearson's Weekly* arranged a 'great picture contest' in connection with the names of railway stations. They prepared a printed list of such names for the use of competitors, using for this purpose the index to *Bradshaw's Railway Guide*. The proprietors of the latter publication succeeded in recovering damages in an action for the infringement of their copyright.<sup>2</sup>

#### LITERARY WORK

The Courts will not define what amounts to an 'original literary composition', but they have definitely refused protection to the pub-

<sup>1</sup> Section 35, page 314 Appendix.

<sup>2</sup> *Blacklock v. Pearson*, [1915] 2 Ch. 376.

lisher of a periodical of lists of selected horses to win at races in the ensuing week.<sup>1</sup>

A translation and summarisation of a speech in Portuguese has been held to be an original literary work,<sup>2</sup> and so have examination papers set for the London Matriculation Examination.<sup>3</sup> The period of protection for a translation depends on the date of death of the translator.

#### NO COPYRIGHT IN IDEAS

It must be remembered that there is no copyright in ideas; the language in which the idea is expressed is the only thing protected. For this reason it was held that there was no copyright in a card so cut that, when held up to the light, it cast a shadow resembling the well-known picture 'Ecce Homo'. It was further said that the plaintiff was the inventor of a trick, and not the author of a literary work, and this in spite of the fact that a title and printed instructions accompanied the card.<sup>4</sup>

Similarly, no protection was afforded to a system of coloured cards in the nature of a card index for the classification of insurance cards, which also bore a few printed words,<sup>5</sup> nor yet to cricket scoring sheets.<sup>6</sup>

#### PUBLICATION

For works to be entitled to the automatic protection of copyright, (a) in the case of published works they must have been first published within His Majesty's dominions; and (b) in the case of unpublished works, copyright means the right to publish, and the author must at the date of making the work have been a British subject or resident within His Majesty's dominions.<sup>7</sup>

The question of the place of publication therefore becomes very material in the case of the work of foreign authors, and is considered in Chapter Twenty on 'International Copyright'.

Publication is defined for this purpose as meaning 'the issue of the work to the public', and does not include public performance of dramatic or musical work, nor public delivery of lectures.<sup>8</sup> But, notwithstanding this special point of 'publication', copyright includes the sole right of performance of dramatic works, and the conversion of dramatic work into novels. The copyright in lectures, dramatised novels, and artistic works will also be dealt with separately later.

<sup>1</sup> *Chilton v. Progress Printing Co.*, [1895] 2 Ch. 29.

<sup>2</sup> *Byrne v. Statist Co.*, [1914] 1 K.B. 622.

<sup>3</sup> *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601.

<sup>4</sup> *Cable v. Marks* (1882), 52 L.J.Ch. 107.

<sup>5</sup> *Libraco v. Shaw Walker*, [1913] 30 T.L.R. 22.

<sup>6</sup> *Page v. Wisden* (1869), 20 L.T. 435.

<sup>7</sup> Section 1 (1), page 300 Appendix.

<sup>8</sup> Section 1 (3), page 300 Appendix.

This, it will be noted, is a much narrower definition of publication than the one recognised by the law of libel. For purposes of copyright a work is published if printed copies are gratuitously distributed to the public,<sup>1</sup> but if the work is only issued for private circulation it appears that it is not published, e.g. a report prepared by an engineer for a financial syndicate.<sup>2</sup>

In the case of an alleged infringement of musical or dramatic copyright by a 'private performance', if the audience is such that there is a probability of injury to the owner of the copyright, it will be held that the performance was in public.<sup>3</sup>

#### OWNERSHIP OF COPYRIGHT

Subject to certain provisions, the Act lays down that the author of a work shall be the first owner of copyright therein.<sup>4</sup> Thus, where a song was composed for performance in Italian opera and in defence to the author's action for infringement it had been set up that all compositions so performed were the property of the 'house', it was held that this could not be supported, and that such property was vested in the author.<sup>5</sup>

#### COPYRIGHT IN LETTERS

Again, the recipient or possessor of letters is not entitled to publish them, or even extracts, and if they are written in confidence he is not entitled to communicate their contents to third persons. But, subject to this, the right to use a letter does not depend upon the intention of the writer, and a person lawfully in possession of letters may use the *information contained* for the purpose of writing a biography without any authority from the writer.<sup>6</sup>

#### WORK DONE TO ORDER

But where a photograph, engraving or portrait is made to a customer's order and paid for, then the customer is the owner of the copyright. The generosity of enterprising photographers who offer to take portraits free, and present the sitter with a finished copy, is usually to be explained by the fact that they suppose the copyright has or may acquire some value, and therefore they prevent it from passing to the sitter in this way.<sup>7</sup>

Very little may suffice to support a plea of work done to order. In one case, in 1925, an artist had merely changed the colours of a design

<sup>1</sup> *Blanchett v. Ingram* (1887), 3 T.L.R. 687.

<sup>2</sup> *Kenrick v. Danube Collieries*, [1891] 4 H.L.Cas. 815, 962.

<sup>3</sup> *Harms & Chappell v. Martan's Club*, [1926] W.N. 245.

<sup>4</sup> Section 5, page 302 Appendix.

<sup>5</sup> *Storace v. Longman* (1788), 2 Camp. 27.

<sup>6</sup> *Philip v. Pennell*, [1907] 2 Ch. 577.

<sup>7</sup> Section 5 (1) (a), page 302 Appendix.

at the request of the person to whom he wished to sell it.<sup>1</sup> The latter thereby acquired the copyright in the altered design.

#### AUTHOR UNDER CONTRACT

Where an author is in the employment of some other person under a contract of service, his employer is (in the absence of any contrary agreement) the first owner of the copyright of work made in the course of his employment.<sup>2</sup> This provision only refers to ordinary contracts of service, and, even here, where the work consists of articles and magazine contributions, the author's 'volume rights' in respect of his collected work are automatically excluded by the Act, subject again to any express agreement.<sup>3</sup> A regular contributor to a periodical who is not a member of the publisher's staff would not normally be working under a contract of service.

An interesting example of authorship under contract was contained in the London University Matriculation Papers case mentioned above.<sup>4</sup> In that case it was held that the copyright vested in the examiners, that they were not under a contract of service within the meaning of the Act, but that they were subject to an obligation to assign the copyright to the University.

The point concerning publication in an unauthorised form has also arisen in respect of encyclopædia articles, and the rule has been made clear that the proprietor of the work cannot without the author's consent publish the article separately.<sup>5</sup> And even in cases where a publisher has secured from the author the exclusive copyright for all purposes it has been held that actual payment for the work is an essential implied condition for the vesting of the copyright.<sup>6</sup>

#### JOINT AUTHORSHIP

Adaptations and corrections do not suffice to give a collaborator a share in the copyright. There must be a clear preconceived design, and it is not enough only to suggest a subject. A lessee of a theatre employed an author to write a play, and afterwards altered it, inserting an additional scene. The author's receipt read thus: 'Received of — the sum of £4 15s., on account of 15 guineas for my share as co-author, &c.' The balance was never paid and it was held that there was no evidence that the lessee was a joint author.<sup>7</sup>

#### DURATION OF COPYRIGHT

The term for which copyright subsists is normally the life of the

<sup>1</sup> *Con Planck v. Kolynos*, [1925] 2 K.B. 804.

<sup>2</sup> Section 5 (1) (b), page 302 Appendix.

<sup>3</sup> See Chapter II, 'Contracts of Service and Volume Rights', page 8, *ante*.

<sup>4</sup> *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601.

<sup>5</sup> *Hereford v. Griffin* (1848), 17 L.J.Ch. 210.

<sup>6</sup> *Richardson v. Gilbert* (1851), 20 L.J.Ch. 553.

<sup>7</sup> *Levy v. Rutley* (1871), 24 L.T. 621.

author and fifty years after his death. But at the expiration of twenty-five years from death anyone may reproduce the work for sale on condition of giving notice to the personal representative or other owner of the copyright in the prescribed form, and of paying him ten per cent. of the published price.<sup>1</sup>

In the case of works in which copyright subsisted in the year 1911, the period at which the latter provision takes effect is thirty years after death instead of twenty-five.<sup>2</sup> Copyright in works of joint authorship ends fifty years after the death of the author who dies first, but if the surviving author is still living at the expiration of the fifty years, then for the period of the life of the latter only.<sup>3</sup>

In certain cases there is a fixed term of fifty years for the duration of copyright, viz. Government publications,<sup>4</sup> posthumous works (fifty years from publication),<sup>5</sup> and photographs. The period in respect of photographs is reckoned from the making of the original negative, and the person who was the owner at that time is deemed to be the author.<sup>6</sup>

#### ASSIGNMENTS

The Act makes provision for the assignment of copyright subject to any limitations that the parties agree, but all with one statutory condition. That is that no such grant is to be valid unless it is in writing signed by the owner of the right, or his duly authorised agent.<sup>7</sup>

In an old case it was held that evidence of the plaintiff's acquiescence in the defendant's publication of the copyright matter six years earlier was no proof of assignment, even though it was supported by a receipt for money paid as the price of copyright.<sup>8</sup>

#### EQUITABLE ASSIGNMENTS

This does not mean, however, that if the assignee can give clear evidence of a verbal agreement to assign, he is altogether without a remedy. The author, if he has accepted payment, is under a legal obligation to assign the copyright, and until he carries out this obligation the purchaser is an 'equitable' though not a 'legal' assignee.

In the event of piracy the equitable assignee can take action against the infringing party, but in view of a recent House of Lords decision he will be wise to make the author a co-plaintiff.<sup>9</sup>

<sup>1</sup> Sections 3 and 5 (2), page 302 Appendix.

<sup>2</sup> Section 3, page 302 Appendix.

<sup>3</sup> Section 16, page 306 Appendix.

<sup>4</sup> Section 18, page 307 Appendix.

<sup>5</sup> Section 17, page 306 Appendix.

<sup>6</sup> Section 21, page 309 Appendix.

<sup>7</sup> Section 5 (2), page 302 Appendix.

<sup>8</sup> *Latour v. Bland* (1818), 2 Stark 382.

<sup>9</sup> *Performing Right Society v. London Theatre of Varieties*, [1924] A.C. 1. See also *Hodges v. Welsh* (1840), 2 Ir.Eq.R. 266.



### TERM OF ASSIGNMENT

The author is not free to assign the whole normal term of his copyright. The Act provides expressly that no assignment shall operate beyond the expiration of twenty-five years from the death of the author, unless it is made by will. Notwithstanding any other agreement that he may have made, the reversionary interest then devolves on his personal representative as part of his estate.

This provision does not apply to assignments of copyright in a collective work and in other cases its effects can be avoided by making proper testamentary arrangements.<sup>1</sup>

### LICENCES

This term is reserved for the grant of some particular interest in copyright and arises frequently in relation to dramatic representations. Written evidence of the grant of the licence is essential.

Many years ago a declaration was sought on the part of a certain newspaper that it was entitled to the use of the matter and the type of *The Times*. The claim was based on a long-standing usage to make up this newspaper out of the last two preceding issues of *The Times*, but there was no agreement in writing. The declaration was refused on the ground that it was an attempt to convert a licence into a right, and that no grant could be presumed from long usage unless the origin of the usage was unknown.<sup>2</sup>

Another interesting case on this subject was brought in 1924 by the authoress of the *Scarlet Pimpernel*. Some twenty years previously she and her husband had granted to certain theatrical managers the right of production of this story for a tour, and also for performance at a first-class West-End theatre for two years. In the event of their producing the play within this period the *entire rights* for the United Kingdom, U.S.A. and Canada became theirs inalienably, and they were to be free to present it when and where they would within the countries aforesaid, paying the authoress five per cent. of the takings.

The authoress sought a declaration that she had the sole rights to perform the work by cinematograph films. The Court held that this right was already vested in the defendants and the action failed.<sup>3</sup>

### COPIES FOR PUBLIC LIBRARIES

Section 15 of the Copyright Act, 1911, requires the publisher of a book (as defined) to send a copy to the British Museum and, if asked, a copy to each of certain other libraries. See details as to this under 'Statutory Requirements', page 71.

<sup>1</sup> Section 5 (2), page 302 Appendix.

<sup>2</sup> *Platt v. Waller* (1867), 17 L.T. 159.

<sup>3</sup> *Barstow v. Terry*, [1924] 2 Ch. 316.

## CHAPTER SEVENTEEN

### INFRINGEMENTS OF COPYRIGHT

#### INFRINGEMENTS

By no means all use of existing work is prohibited, and thus it is of great importance to know what constitutes an infringement of copyright and what does not.

The Copyright Act defines the point fully. Copyright is infringed by anyone who *does anything*, the sole right to do which is by the Act conferred on the owner of the copyright, if done without the owner's consent.<sup>1</sup> It is also an infringement to sell or let for hire, to exhibit or distribute, work which a person *knows* to be itself an infringement of copyright.<sup>2</sup> Thus, in the first case the law assumes the offender's guilty knowledge, while in the second case the plaintiff must prove it.<sup>3</sup>

#### A 'SUBSTANTIAL' PART

An important point to be remembered is that there is no infringement unless the matter copied constitutes a *substantial* part of the publication.<sup>4</sup> But this does not necessarily mean a large part. To use the vital section of a work may prejudice the sale of the original book, although the actual quantity is small.<sup>5</sup>

In the following case the general principle is well illustrated. An author wrote a school-book, assigned the copyright and agreed not to publish any similar work during the term of agreement. He then produced another book on the same lines with the same system of lessons, and in the action which followed he was held to have made an unfair use of the same material that he had drawn upon in the earlier work. The case did not turn upon any idea of actual copying, but rather upon unfair dealing.<sup>6</sup>

There is another case which is also of importance as illustrating one or two special points. The P. & O. Steam Navigation Co. required a code for internal work; they purchased a copy of an existing code book, and with its aid compiled their own private telegraphic code. This was not produced for sale but merely for distribution among the company's agents at home and abroad. It was held, notwithstanding, that the plaintiff's copyright had been infringed, and an injunction

<sup>1</sup> Section 2 (1), page 301 Appendix.

<sup>2</sup> Section 2 (2), page 301 Appendix.

<sup>3</sup> See 'Who may be sued', page 106, *post*.

<sup>4</sup> *Cooksley v. Johnson*. [1905] 25 N.Z.I.R. 834; Section 1 (2), page 300. *post*.

<sup>5</sup> *Branwell v. Halcomb* (1836), 3 My. & Cr. 737.

<sup>6</sup> *Educational Co. of Ireland v. Fallon & Getz*, [1919] 1 I.R. 62.

was obtained.<sup>1</sup> This case should be compared with those given in the previous chapter under 'Publication' of privately circulated work.<sup>2</sup>

#### WHAT DOES NOT CONSTITUTE AN INFRINGEMENT

In proper cases, however, the incorporation of existing matter into new work may not constitute any breach of copyright, and it is of even greater value to grasp exactly what is meant by '*fair dealing*' than to form an ill-defined notion of the general right.

The Act contains a number of exceptions to the general rule which constitute statutory defences to an action for infringement of copyright.

#### FAIR DEALING

The first of these exceptions is by far the most important and must be closely considered.

'Any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary, shall not constitute an infringement of copyright.'<sup>3</sup>

The criterion is whether the author has or has not given real literary labour to the work, and whether that labour was honestly applied to the various sources of information. A transcript with colourable additions and variations is piratical, but there must be more than mere passages which have to be tracked through hundreds of pages.<sup>4</sup>

Quotations for purposes of review and fair abridgements or abstracts may be protected, but if in one number of a magazine there was a criticism, and then in the following numbers there were bare extracts, these would not be so protected.<sup>5</sup> It has also been judicially said 'that an abridgment where the understanding is employed in retrenching uninteresting circumstances is not a plagiarism, but an allowable and meritorious work.'<sup>6</sup>

#### ACKNOWLEDGED USE

When original sources are properly acknowledged, the author will be acquitted of literary dishonesty; but this may not free him of liability for damages, because if in spite of this the sale of the original work is injured, the owner of the copyright is not to be deprived of his remedy by the fact that the injury was done openly.

A case in point which was successfully fought by the proprietors of *Punch*, related to cartoons of Napoleon III, published between 1849 and 1867. After his fall in 1871 a book appeared concerning that

<sup>1</sup> *Ager v. P. & O. Co.* (1884), 26 Ch.D. 637.

<sup>2</sup> Especially *Harms & Chappell v. Martans Club*, [1926] W.N. 245, page 99, *ante*.

<sup>3</sup> Section 2 (1) i, page 301 Appendix.

<sup>4</sup> *Jarrold v. Heywood* (1870), 18 W.R. 279.

<sup>5</sup> *Whittingham v. Wooler* (1817), 2 Swan 428.

<sup>6</sup> *Anon.* (1774), 98 E.R. 913, L.C.

monarch's life, one part of which was entitled *The same story as told by Popular Cartoonists*. This part contained reduced copies of the *Punch* cartoons, and it was held that the proprietors of *Punch* were entitled to recover damages as their consent to such reproduction had not been obtained.<sup>1</sup>

From time to time attempts have vainly been made to set up, by way of defence, a custom among newspapers, journalists and publishers to copy from one another in certain circumstances; but it has been decided that even if the practice were established it would not constitute a sufficient answer.<sup>2</sup>

There are certain works of the nature of compilations, such as directories and dictionaries, in which originality is out of the question. The test in these cases is the amount of real intellectual effort given, and an author must always acknowledge the use he has made of existing works.<sup>3</sup>

Finally, we may refer, on the topic of fair dealing, to a 1925 decision concerning a circular trade letter in which a manufacturer offered special rates to customers who undertook not to deal elsewhere in respect of a particular commodity. A competitor then took the step of further circularising this same communication together with a covering letter of criticism. The first issue to be disposed of at the trial was a claim that the original circular was not entitled to protection in the interest of public policy as being 'in restraint of trade'. This objection was overruled, and in the judgment it was held that publication by a rival in the circumstances described was not 'fair dealing' within the meaning of the Act.<sup>4</sup>

#### PARTIES TO AN ACTION OF INFRINGEMENT

Any author who has not parted with his rights wholly or in part may maintain an action, and where he has made a proper assignment his assignee may sue.

It should be added that in spite of the statutory requirement that all assignments are to be in writing,<sup>5</sup> cases necessarily arise where great hardships would be caused if this were made an absolute condition precedent to the assignee's right of action. Therefore it has been ruled that an equitable assignee can take action, notwithstanding that he has not obtained an assignment in writing, if he is in a position to compel a legal assignment.<sup>6</sup>

<sup>1</sup> *Bradbury v. Hotten* (1872), L.R. 8 Exch. 1.

<sup>2</sup> *Maxwell v. Somerton* (1874), 22 W.R. 313.

<sup>3</sup> *Spiers v. Brown* (1858), 31 L.T.O.S. 16.

<sup>4</sup> *British Oxygen Co. v. Liquid Air Co.*, [1925] Ch. 383.

<sup>5</sup> Section 5 (2), page 302 Appendix.

<sup>6</sup> *Hodges v. Welsh* (1840), 2 Ir. Eq. R. 266; and see Chapter XV I, 'Equitable Assignments', page 101 *ante*.

The question of co-ownership again is one which may give rise to difficulty, and such a case arose in respect of an important work on antique furniture, Herbert Cescinsky's *English Furniture of the Eighteenth Century*.

The copyright was vested equally in the author and the publisher, the latter paying certain royalties. The publishers at a later date brought out a work by another author, which was an infringement of Mr. Cescinsky's copyright, and it was held that the author was entitled to an injunction against his own publishers, in spite of the fact that they were co-owners. The relevant words of the Act are, that there shall be an infringement by any person doing 'anything the sole right to do which is conferred on the owner of the copyright';<sup>1</sup> and the reasoning followed was that 'the owner' means all co-owners; and any one such co-owner may restrain an infringement, acting alone, even though the infringer is another co-owner.<sup>2</sup>

#### WHO MAY BE SUED

Any person may be liable who, without the consent of the owner of the copyright, *produces or reproduces* the work or any substantial part thereof, or authorises the same.<sup>3</sup>

Further, copyright shall be deemed to be infringed by any person who sells or lets for hire any work which *to his knowledge* infringes copyright. It is sufficient if the infringing work is merely exposed for sale, and it is also an infringement to import such a work for sale or hire.<sup>4</sup>

In addition, it is possible to obtain an absolute prohibition preventing the importation of such work, if the owner of the copyright gives proper notice to the Commissioners of Customs and Excise.<sup>5</sup> It is in virtue of this provision that the cheap Continental 'Tauchnitz' reprints of English authors and similar publications are excluded by the Customs officials.

Clearly, then, all persons engaged in *production* of an infringing work are liable, whether they are morally innocent or not; whilst actual knowledge must be proved in addition to make a distributor liable.

Where an exhibiting firm commissioned an artist to produce a poster depicting a lion, and he infringed another artist's copyright, it was held that the firm had not caused or procured a copy to be made contrary to the Fine Arts Copyright Act, 1862.<sup>6</sup>

Again, where a printing contract had to be carried out under pressure of time, work which turned out to be a piracy was handed

<sup>1</sup> Section 2 (1), page 301 Appendix.

<sup>2</sup> *Cescinsky v. Routledge*, [1916] 2 K.B. 325.

<sup>3</sup> Section 1 (2), page 300 Appendix.

<sup>4</sup> Section 2 (2), page 301 Appendix.

<sup>5</sup> Section 14, page 305 Appendix.

<sup>6</sup> *Bolton v. London Exhibitions Ltd.*, [1898] 14 L.T.R. 550.

over by the *publishers* to a second firm of printers for execution; in spite of this, the original firm's name was shown on the title page, but they were held not to have committed any infringement in the circumstances.<sup>1</sup> The result would have been different if the first *printing* firm had *themselves* sublet the contract in the ordinary way.

These are, of course, exceptional cases, and are quoted to show the limits to which the rule as to liability extends, and the point beyond which it cannot be stretched.

#### PERIOD OF LIMITATION

No action in respect of infringement of copyright is to be brought after the expiration of three years after the infringement.<sup>2</sup>

#### REMEDIES – INJUNCTION

The one general remedy of the aggrieved owner of copyright is to sue for an injunction.<sup>3</sup> This is entirely irrespective of considerations such as that of guilty knowledge, and it is obviously good sense as well as good law in every case that the sufferer should be entitled to an order of the Court that the abuse shall not continue.

In cases of unusual urgency the plaintiff may be subject to serious additional damage by the very fact of the delay preceding the trial, and in these cases he will 'move for an interlocutory injunction', which will be granted or refused on a *prima facie* argument. The plaintiff must show the urgency of the matter, and above all that there has been no delay or acquiescence on his own part. In order to save the expense of the trial of the action itself the parties sometimes agree to accept the decision on this preliminary application as final.

Any party obtaining an interlocutory injunction will be required to enter into an undertaking to be answerable for any damage which he may have occasioned to the other side by inducing the Court to grant him this relief, if it turns out at the trial that he was not entitled to it.

#### UNDERTAKING NOT TO CONTINUE INFRINGEMENT

It is, of course, always open to a defendant to seek a settlement during a dispute and before a writ is issued, on the footing of an undertaking that he will not repeat the act complained of, and will pay such damages as may be agreed. But a plaintiff is under no obligation to be satisfied with such an undertaking, and may quite properly press for his legal remedy, the injunction.<sup>4</sup> If, however, the offer is repeated after the issue of the writ, and in addition the defendant undertakes

<sup>1</sup> *Kelly's Directories v. Gavin & Lloyds*, [1902] 1 Ch. 631; and see Chapter XIII for 'Liability of Trade Printers', page 76 *ante*.

<sup>2</sup> Section 10, page 304 Appendix.

<sup>3</sup> Section 6 (1), page 303 Appendix.

<sup>4</sup> *Savory v. World of Golf*, [1914] 2 Ch. 566.

to submit to an order and to pay the costs to date, the plaintiff would probably be deprived of subsequent costs, if he again refused the offer and insisted on proceeding with the litigation.

The right of the Court to grant injunctions is very wide. In one case the complaint was merely that a publication was bound in such a way and in such a cover as was calculated to deceive intending purchasers of plaintiff's copyright book,<sup>1</sup> and even here an injunction was sought for and obtained.

#### OTHER CIVIL REMEDIES

The Act provides civil remedies for infringement in the following terms: 'The owner of the copyright shall be entitled to all such remedies by way of injunction, damages, accounts and otherwise, as are or may be conferred by law for the infringement of a right.'<sup>2</sup>

And: 'All infringing copies of any work in which copyright subsists, and all plates used or intended to be used for their production, shall be deemed *to be the property of the owner of the copyright*, who accordingly may take proceedings for the recovery of the possession thereof, or in respect of the conversion thereof.'<sup>3</sup>

In addition to the injunction (and to the criminal penalties which will be considered separately), there are thus three civil claims: (1) For damages; (2) for an account; (3) for recovery or conversion. If the application for an injunction is refused, the Court will not give any other relief; but this is, of course, irrespective of the interlocutory application, which is only granted in clear cases.

#### ACCOUNTS

In spite of the fact that the wording of the section makes it appear that the injunction, damages and account are concurrent remedies, the law is that the plaintiff must choose between the two last named. He may in a proper case obtain either of them in addition to his injunction and his remedy for conversion, but he will not get both.

Provided damages are not sued for, an account follows automatically on the injunction;<sup>4</sup> and the account is an account of *net* profits only. As a rule, a more substantial claim can be made for 'damages' than in an 'account'; but the latter has the advantage that a plaintiff will obtain an order for full 'discovery' of the defendant's books and documents for the purposes of the account, and this may stand him in good stead in his claim for 'conversion'.

#### DAMAGES

The measure of damages is the loss sustained by the plaintiff, and the claim may or may not have any relation to the profit made by the

<sup>1</sup> *Spottiswoode v. Clarke* (1846), 2 Phil. 154.

<sup>2</sup> Section 6 (1), page 303 Appendix.

<sup>3</sup> Section 7, page 303 Appendix.

<sup>4</sup> *Baily v. Taylor* (1829), 1 Russ. & M. 73.

defendant, but in any case it would seem to include this latter amount, together with such other sum as the Court presumes, or the plaintiff proves he has lost. This remedy is thus far more effective than a mere account for, and an order for payment of, the defendant's profits.

Such assessments of damages often seem exceedingly capricious. A typical case was that of a translation of a Portuguese speech inserted in a newspaper. The translation had been done by a journalist, who owned the copyright, and he was awarded £150 damages for infringement.<sup>1</sup>

#### CONVERSION

Unquestionably the most stringent of the remedies is contained in the section dealing with conversion. It is no longer a question of accounting for profits, nor yet of a fair deduction from receipts being made for the cost of labour, materials and overhead charges.

The offending copies are deemed to be the *property* of the owner of the copyright. Thus in one case 1,010 pirated copies had been sold for £38 19s. 9d., showing a profit of £8 10s. 4d., and a further 29 copies had been sold with a profit of £1 4s. 2d. Damages for the conversion were assessed at £42.<sup>2</sup>

Apart again from this action of conversion in respect of the *value* of sold goods, the plaintiff has an action of 'detinue' entitling him to delivery-up of the unsold stocks, all of which are regarded as his property.

#### INNOCENT INFRINGEMENT

As some sort of relief against the extreme severity of these provisions, the Act goes on to say that a plaintiff shall not be entitled to any other remedy than that of an injunction, if the defendant proves that he was not aware and had no reasonable ground for suspecting *that copyright subsisted* in the work.<sup>3</sup>

Whatever may have been the intention of the Legislature, this plea is to all intents and purposes valueless. The defendant must be presumed to know the law, which is that copyright exists automatically in the work of living writers and for a fixed period after their death. He cannot, therefore, in ordinary circumstances be allowed to claim that 'he had no reasonable ground for suspecting that copyright subsisted'.

Cases in which the plea has been accepted are all but unknown, and presumably it would only be considered if the infringing party could show special grounds, e.g. that he reasonably believed the term of copyright had expired, or that the work was published in such a way and in such a country that no copyright existed here. In any case the burden of proof is on the defendant, and absence of carelessness is not enough.

<sup>1</sup> *Byrne v. Statist Co.*, [1914] 1 K.B. 622.

<sup>2</sup> *Muddock v. Blackwood*, [1898] 1 Ch. 58.

<sup>3</sup> Section 8, page 303 Appendix.



A good example arose in the case of the Portuguese translation mentioned above.<sup>1</sup> The copyright was, as stated, *in the journalist* who translated a speech of the Governor of Bahia; the speech was published by one newspaper, and then the defendant newspaper sought and obtained the *first paper's* permission to copy it. The plea of innocence was set up, but the learned judge said that 'the section affords no defence to persons who, *knowing that copyright exists, make a mistake as to the owner of the copyright*, and under that mistake obtain authority to publish from a person who is not the owner'.

Thus every publisher is taking a risk in buying copy, in spite of any assurance he receives that the copyright is in the vendor; and in the event of an infringement his innocence will not excuse him.

#### INSURANCE AND INDEMNITIES

The remarks on insurance against the risks of claims against printers and publishers in respect of libel apply equally in regard to infringement of copyright.<sup>2</sup> The effect of the Law Reform (Married Women and Tortfeasors) Act, 1935, in relation to indemnities as between any two persons concerned in the publication of a libel, apply also as between joint infringers of copyright.<sup>3</sup>

#### PENAL PROVISIONS

In addition to certain special punishments (provided by the Fine Arts Copyright Act, 1862, and the Musical Copyright Acts, 1902 and 1906) the Copyright Act, 1911, lays down certain penalties applicable on summary conviction for infringement of copyright.

In every case the prosecution must prove that the offence was committed 'knowingly', and this being a criminal provision is strictly interpreted. The fines are 40s. for every copy dealt with, with a maximum of £50; while the second and subsequent offences may be punished with two months' imprisonment instead of the fine.<sup>4</sup>

The Court may also, whether the alleged offender is convicted or not, order that all infringing copies, plates, &c., be destroyed or delivered up to the owner of the copyright.

It has been held that any combination of persons to commit a piracy may be guilty of a 'criminal conspiracy' to deprive the owner of the copyright of his property;<sup>5</sup> and finally it is quite refreshing to be able to add that it has also been judicially said that the mere sale of pirated matter is *not* 'larceny' at common law.<sup>6</sup>

<sup>1</sup> *Byrne v. Statist Co.*, [1914] 1 K.B. 622.

<sup>2</sup> See page 86, *ante*.

<sup>3</sup> See page 85, *ante*.

<sup>4</sup> Section 11 (1), page 304 Appendix.

<sup>5</sup> *R. v. Bokenham, Times*, 22nd July, 1910.

<sup>6</sup> *R. v. Kidd & Walsh*, [1907] 72 J.P. 104.

## CHAPTER EIGHTEEN

### PARTICULAR APPLICATIONS OF COPYRIGHT LAW

#### IMMORAL PUBLICATIONS

ON the grounds of public policy the Court will refuse to grant an injunction or other protection in respect of the copyright of works of an irreligious or immoral tendency.<sup>1</sup> Thus when an action was brought to prevent piracy of Lord Byron's poem *Gain*, it failed because it was said to be doubtful whether the poem did not contravene the teaching of the Scriptures.<sup>2</sup>

On analogous grounds, piracy of certain books which tend to deceive the public has gone unchecked. In one case a trade catalogue described articles as 'patent', contrary to fact,<sup>3</sup> and in another a book entitled *Evening Devotions from the German*, purporting to be a translation from a well-known German writer, was in point of fact composed by a little-known English author.<sup>4</sup>

#### NEWS

It is a fundamental principle of this branch of the law that there can be no copyright in an idea, and therefore it is obvious that there can be no copyright in news as such. It is the language in which the news is expressed only which is the subject of copyright, but it has also been decided that it is no defence to an action for infringement to say that it is the common practice of newspapers to copy from one another.<sup>5</sup> It must be added, however, that there is a common law right of property in *unpublished information*, and this right will be protected in a proper case by injunction. The right in question here, however, is quite separate from copyright.<sup>6</sup>

#### TITLES OF PUBLICATIONS

The principles to be considered in relation to the ownership of titles raise questions which properly fall to be dealt with under the heading of copyright. Difficulties in this direction arise most frequently in connection with newspapers and magazines and the subject can be referred to here in that connection.

<sup>1</sup> *Glyn v. Western Feature Films*, [1916] 1 Ch. 261.

<sup>2</sup> *Murray v. Benbow* (1822), 1 Jac. 474.

<sup>3</sup> *Slingsby v. Bradford Patent Trunks*, [1906] W.N. 51 C.A.

<sup>4</sup> *Wright v. Tallis* (1845), 1 C.B. 893.

<sup>5</sup> *Walter v. Steinkopff*, [1892] 3 Ch. 489.

<sup>6</sup> *Exchange Telegraph v. Gregory*, [1896] 1 Q.B. 147; *Exchange Telegraph v. Central News*, [1897] 2 Ch. 48.

The general law is, that there is no exclusive copyright in a title a such. No doubt if it can be established that the title is a *literary work* then it should be the subject of copyright; but since it has been frequently decided that there can be no such right in 'hackneyed phrases',<sup>1</sup> and in purely 'descriptive words', it is usually better to adopt an alternative line. This is based upon the principle that it is a common law fraud to issue a publication under the name of an existing periodical with the intention of deceiving purchasers. The plaintiff will have to show that he has consistently used the title for such a period as to have given him a 'reputation' in the mind of the public as the user of the title; and further he must prove some injury or probability of injury, which may arise by loss of circulation, or by loss of advertisements, or in any other way, before he can obtain an injunction restraining the other party from using the title of his publication.

The latter point was illustrated in a well-known case between the proprietor of a daily morning newspaper called the *Morning Post* and the owner of a later publication called the *Evening Post*.<sup>2</sup> There was no evidence of any actual injury having been done to the plaintiff, and it was held that although the similarity of the names might be calculated to cause confusion, and a supposition that some connection existed between the papers, yet as there was no probability that the plaintiff would be injured by this supposition, an injunction must be refused.

#### TRANSMISSION OF RIGHT TO USE NEWSPAPER TITLE

Although in ordinary cases no copyright will be held to exist in the title of a newspaper, yet the right of publication under a particular name is subject to the ordinary law of property and is regarded as a chattel capable of assignment.<sup>3</sup> Thus upon the death or bankruptcy of the owner the right to use the title will pass to his personal representative or to his trustee in bankruptcy, and the latter will at the same time acquire the right in a proper case of preventing any other person from adopting the name. Property in the name of a newspaper may even be made the subject of mortgage, but such security would be of doubtful value in case of bankruptcy unless the mortgagee had registered himself as proprietor.<sup>4</sup>

Having regard to the special nature of this kind of property, where the whole value lies in public reputation, and is a sort of 'goodwill', it is clear that if the title includes the owner's own name, then upon any sale or assignment the purchaser obtains an absolute right to the use of the vendor's name in this connection. This point was established

<sup>1</sup> *Dicks v. Yates* (1881), 18 Ch.D. 76.

<sup>2</sup> *Borthwick v. Evening Post* (1888), 37 Ch.D. 449.

<sup>3</sup> *Kelly v. Hutton* (1868), 3 Ch. App. 703.

<sup>4</sup> *Re Baldwin, ex parte Foss* (1858), 2 de G. & J. 230, C.A.

many years ago in an action concerning the sale of a publication called *Beeton's Christmas Annual*.<sup>1</sup>

If, however, a partner's name forms no part of the title, there is nothing to prevent his publishing a statement that he is no longer connected with the periodical, although he must not say anything which would be calculated to injure the periodical.

Dickens, some of whose novels appeared in serial form in *Household Words* and who was the editor and part proprietor of the magazine, was made a defendant to an action following an advertisement by him that the publication would be discontinued.<sup>2</sup> It was said in the course of the judgment that the right to use the name must be sold for the benefit of all the partners, as part of the partnership assets, and Dickens was not entitled to advertise the discontinuance of the journal except as regards himself personally.

#### MAPS

The statutory definition of 'literary work' includes maps, charts, plans, tables and compilations.<sup>3</sup> This includes bird's-eye views and the like; but the face or dial of a barometer has been definitely excluded,<sup>4</sup> and so was a cardboard pattern sleeve containing scales for adaptation for other sizes.<sup>5</sup> The date of this decision, 1894, fixes this case as a curious relic of a very pronounced late Victorian fashion.

#### LECTURES AND SPEECHES

The Copyright Act provides that 'it shall not be an infringement of copyright, in an address of a *political* nature delivered at a public meeting, to publish a report thereof in a newspaper.'<sup>6</sup>

Also, among sundry special cases which are deemed not to be infringements of copyrights, is the publication in a newspaper of a *report of a lecture delivered in public*. But such *report* may be prohibited by the exhibition of conspicuous notices affixed at the main entrance of the building, and in a position near the lecturer.<sup>7</sup> A proper newspaper *summary* is, however, never an infringement.

But the general copyright in lectures and speeches as distinct from these special provisions appears already to be secured by the general definition.<sup>8</sup> They come within the general description of literary work, and the term 'lecture' includes address, speech and sermon.

<sup>1</sup> *Ward v. Beeton* (1874), L.R. 19 Eq. 207, page 17, *ante*.

<sup>2</sup> *Bradbury v. Dickens*, 28 L.J.Ch. 667.

<sup>3</sup> Section 35, page 314 Appendix.

<sup>4</sup> *Davis v. Comitti* (1885), 54 L.J.Ch. 419.

<sup>5</sup> *Hollinrake v. Truswell*, [1894] 3 Ch. 420.

<sup>6</sup> Section 20, page 309 Appendix.

<sup>7</sup> Section 2 (1) (v), page 301 Appendix.

<sup>8</sup> Section 1 (2), page 300 Appendix.

Public delivery of such work is deemed not to constitute publication,<sup>1</sup> and the author may thus claim the protection given to unpublished literary work; on this view the lecturer can restrain private individuals from publishing his work even though the notice referred to above in connection with newspaper reports was not exhibited.

Formerly the protection was not nearly so wide, and depended on whether the audience was restricted in some way, or delivery was entirely public.

In an interesting case,<sup>2</sup> Pitman, the inventor of the well-known system of shorthand, attended a scientific lecture, admittance being by ticket issued free. He subsequently published the lecture in his monthly magazine in shorthand characters, and an injunction was obtained against him for infringement of copyright.

Universities and colleges mentioned in the old Copyright Act of 1775 have special rights as to lectures which are retained in the 1911 Act.<sup>3</sup> But even apart from these rights, the unauthorised publication for purposes of gain, of lectures delivered in a college is an offence similar to 'breach of confidence' and can be restrained.<sup>4</sup>

#### SCHOOL PUBLICATIONS AND RECITATIONS

Short passages of copyright literary works may be included in collections of mainly non-copyright matter, if the source is acknowledged. But any publisher is not to take more than two passages from the works of the same author within five years. Similarly, public readings and recitations of published works, if done by one person alone, do not constitute any infringement.<sup>5</sup>

#### DRAMATISATIONS

The law as to the dramatisation of existing novels or other literary work has undergone a complete change in recent times. Here as elsewhere in the realm of copyright, this has consisted of a tightening up in favour of the owner.

Formerly it was possible to dramatise a novel without committing an infringement – although it was an act of piracy to print such a dramatisation. On this point there is an illustrative case, showing how small an act suffices for a ground of action (in this as in every other case of 'trespass' on an absolute right). The popular Victorian sentimental novel *Little Lord Fauntleroy* was dramatised without authority, many passages being copied; and the infringement on which

<sup>1</sup> Section 1 (3), page 300 Appendix.

<sup>2</sup> *Nicols v. Pitman* (1884), 26 Ch.D. 374.

<sup>3</sup> Section 33, page 313 Appendix.

<sup>4</sup> *Caird v. Sime* (1887), 12 A.C. 326; Section 31, see page 313 Appendix.

<sup>5</sup> Section 2 (1) (iv) and (vi), see page 301 Appendix.

the action was based was the making of one copy for the Lord Chamberlain and three copies for the actors.<sup>1</sup>

The position now is that copyright includes the sole right to convert any dramatic work into a novel or other non-dramatic work, and vice versa.<sup>2</sup>

In the case of a conversion from a novel into a dramatic work, such conversion may be by way of performance in public or otherwise; and copyright includes the authorisation of such productions, performances and publications.<sup>3</sup>

Dramatic work is defined as including any piece for recitation, choreographic work, or entertainment in dumb show, where the scenic arrangement or acting form, or the combination of incidents represented give, the work an original character.<sup>4</sup>

#### PERFORMING RIGHTS

In this connection, a few remarks on the term 'performing rights' may not be out of place. The Act gives the parties, as we have seen, the widest possible latitude as to the contracts they may enter into in an assignment of copyright. Performing rights may thus be sold, and literary copyright retained.

Interesting arguments have arisen as to whether performing rights include cinema or film rights, and it has been held<sup>5</sup> that in the absence of any provision to the contrary they do; for the Act defines 'performance' as meaning 'any acoustic representation of a work, and any visual representation made by means of any mechanical instrument'.<sup>6</sup>

The cases which centred round the *tableaux vivants*, which will be remembered as a music-hall novelty many years ago, illustrate the modern development in the nature of copyright.

In 1895, the Empire Palace Ltd. successfully defended such an action against a German artist who owned the copyright in the picture represented.<sup>7</sup> In 1916, however, an injunction and damages were obtained against a producer of variety entertainments for a precisely similar exhibition.<sup>8</sup>

#### PARTIAL ASSIGNMENT

The wide rights of assignment conferred by the statute, subject to any limitations the parties may agree (and with the general proviso that no verbal assignment suffices),<sup>9</sup> enable an author to assign full perform-

<sup>1</sup> *Warne v. Serbohn* (1888), 30 C.D. 73.

<sup>2</sup> Section 1 (2) (b), see page 300 Appendix.

<sup>3</sup> Section 1 (2) (c), page 300.

<sup>4</sup> Section 35, see page 314 Appendix.

<sup>5</sup> *Falcon v. Famous Players Film Co.*, [1926] 134 L.T. 246.

<sup>6</sup> Section 35, see page 314 Appendix.

<sup>7</sup> *Hanfstaengl v. Empire Palace*, [1894] 2 Ch. 1, C.A.

<sup>8</sup> *Bradbury Agnew v. Day*, [1916] 32 T.L.R. 349.

<sup>9</sup> Section 5 (2), see page 302 Appendix.

ing rights as we have seen, or performing rights from which cinema rights are excluded, or broadcasting rights or literary rights, or any combination of rights in any localities that he may select.

Thus, some years ago, a cinematograph 'film booking' company hired out certain films for exhibition at two places of entertainment and the exhibitors agreed not to show them elsewhere. In breach of their contract, however, they arranged further exhibitions, and made poster announcements accordingly. In the action which followed two interesting points arose; the one was that the exhibitor had infringed the plaintiff's copyright, in addition to breaking his contract; and the other was that the infringement was committed by merely *issuing the posters*. This was held to be an act 'authorising the production' and as such included within the sole right of the owner of the copyright.<sup>1</sup>

#### WIRELESS

By degrees the law relating to wireless is taking form. It is not entirely clear, for example, whether a defamatory statement which is broadcast constitutes a libel or a slander. The Committee on the Law of Defamation, in its report presented to Parliament in October, 1948, considered that all defamatory broadcasts should be treated as libels.

In the matter of copyright, in a recent case the status of the British Broadcasting Company in one respect was defined. This company issued a weekly magazine called the *Radio Times* containing *inter alia* the programme of the ensuing week's concerts and entertainments. Another publication, the *Wireless League Gazette*, in 1926 extracted such matter as they thought would be popular, referring their readers to the *Radio Times* for full details.

In an action for infringement of copyright the defendants claimed that the B.B.C. was a sort of out-department under the Postmaster-General, and that the copyright, if any, was in the Crown. But Mr. Justice Astbury ruled that the contention was unsound.<sup>2</sup>

#### BURLESQUES

Bona fide burlesques, and similar dealings with copyright work, have frequently been held not to constitute an infringement.<sup>3</sup> In an amusing case some years ago the original work was a postcard showing a soldier in a hot and exhausted condition, reading the 'Orders of the day', and underneath were the words, 'And then we have the rest of the day to ourselves'. The alleged infringement depicted the soldier reading the orders, with the same legend, but he was shown to be fresh and cool with his rifle on his shoulder. An injunction was refused.<sup>4</sup>

<sup>1</sup> *Fenning Films v. Wolverhampton Cinemas*, [1914] 3 K.B. 1171; Section 1 (2).

<sup>2</sup> *British Broadcasting Company v. Wireless League Gazette*, [1926] 1 Ch. 433.

<sup>3</sup> *Glyn v. Western Feature Films*, [1916] 1 Ch. 261.

<sup>4</sup> *McCrum v. Eisner*, [1917] 117 L.T. 536.

Similarly where a 'reply' song is produced, based upon the words of a popular and successful song, this has been held not to be a 'colourable imitation'.<sup>1</sup>

#### MUSICAL COPYRIGHT

Musical work, although the subject of protection under the principal Act, is also affected by certain minor enactments which deal with particular aspects.

An Act was passed in 1902 to put an end to street hawking of pirated music. This enables a Court of Summary Jurisdiction to authorise a constable to seize such music without warrant, and in certain cases the seizure may even be made on the bare written request of the owner of the copyright.

This Act was only a partial remedy of a serious abuse. The fact that such printed music did not carry the publisher's name nor the printer's imprint deterred the Legislature at first from attempting a more far-reaching reform. In 1906, however, a second Musical Copyright Act was passed making printers and vendors liable for first offences to a £5 fine, and for subsequent offences to a £10 fine or two months' imprisonment. Hawkers of such music may now be arrested without warrant, following a general written request to the chief officer of police, and search warrants may be issued on sworn information.

#### AUTHORISED VERSIONS OF BIBLE AND BOOK OF COMMON PRAYER

The exclusive right to print these exists in the Crown by prerogative, and the same applies to Acts of Parliament and similar publications<sup>2</sup>; the right to print and publish the Bible and Prayer Book has been granted by letters patent to the King's Printer, and to the Universities of Oxford and Cambridge.

#### BANKRUPTCY OF AN ASSIGNEE OF COPYRIGHT

The Bankruptcy Act, 1914, lays down that where a bankrupt person is under a liability to pay royalties to the author of any work, his trustee in bankruptcy is bound to safeguard the author's rights in all dealings with the bankrupt's estate.<sup>3</sup>

<sup>1</sup> *Francis Day & Hunter v. Feldman & Co.*, [1914] 2 Ch. 728.

<sup>2</sup> *Eyre v. Carnan* (1781), 6 Bac. Abr. 7th edition, 509.

<sup>3</sup> Section 60.



## CHAPTER NINETEEN

### COPYRIGHT IN DESIGN

#### PATENTS AND DESIGNS ACTS

THE law in respect of the unauthorised reproduction of designs is entirely distinct from that of copyright. It is to a great extent codified in the Patents and Designs Acts, 1907 to 1946, and protection depends upon registration.

Copyright, it will be remembered, exists automatically without this in other matters, including incidental 'artistic work'; but the Copyright Act does not apply to *designs* capable of registration under the Patents and Designs Acts, unless such design is *not* intended for multiplication by industrial process in quantities of over fifty.<sup>1</sup>

This provides a technical defence to certain actions for infringement of copyright.<sup>2</sup> A recent case on these lines arose in respect of the advertisement of a medicinal wine.<sup>3</sup> The advertisement consisted of a 'cut out' or silhouette card with a picture of a nurse and a bunch of grapes, which fitted on to a bottle for purposes of display. At the time of the alleged infringement the work had not been registered, and for this reason there could be no protection under the Patents Act; while the fact that it *was* in fact registered later precluded the plaintiff from claiming copyright in an 'artistic work'.

Another recent case concerned the production of small models of a comic cinema figure known as 'Popeye the Sailor', which had been made from designs that had acquired copyright under the Copyright Act. This case established that the owners of the copyright were not deprived of their right by the fact of the subsequent adaptation to articles intended to be multiplied by an industrial process which were 'capable of registration' under the design provisions. The copyright owner had consented to this adaptation, and the action was one raised by producers of competing models.<sup>4</sup> The anomalous position that would seem to arise from this decision was commented upon by the Patents Committee, 1944, in their final report, under the head of 'Designs'.<sup>5</sup>

It will be readily understood that it is at times very difficult to say with any certainty at what point an 'artistic work' becomes a 'design' pure and simple. Thus it is possible that the *Ecce Homo* case, which

<sup>1</sup> Copyright Act, 1911, Section 22; see page 309 Appendix: Designs Rules, 1932, Rule 92.

<sup>2</sup> *Con Planck v. Kolynos*, [1925] 2 K.B. 804.

<sup>3</sup> *Gunston v. Winox*, [1921] 1 Ch. 664.

<sup>4</sup> *King Features Syndicate Inc. and Another v. O. & M. Kleeman Ltd.*, [1940] 58 R.P.C. 207.

<sup>5</sup> Cmd. 7206, presented September, 1947; see page 124, *post*, paragraphs 311 and 312.

was referred to in Chapter Sixteen, would never have been brought, had it arisen after the 1911 Act became law, the plaintiff's position being untenable under Section 22.

The authors of the original edition took the view that the acid test to decide the matter was to apply for the registration of the disputed 'design', and that this settled the question whether the work was really 'artistic work' and automatically protected or not. The editor suggests that this view cannot be maintained as there was no power given to the Controller of the Patents and Designs Office to decide whether any pictorial or decorative work was a design and suitable for registration. There has been no decision by the Courts as to the proper interpretation of the Copyright Act and the Patents and Designs Acts in relation to pictorial or decorative work 'in the flat' as produced in multiplication by printers. See under 'Clarification of Law', page 124, *post*.

#### DEFINITION

In considering the law concerning copyright in designs independently of the Copyright Act, 1911, it is necessary to start with the definition contained in the Patents and Designs Act, 1907.<sup>1</sup>

'Design means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device.'

This definition is obviously framed with a view to marking the boundary between the subject-matter of patent law and that of the law of designs. It would have been of value if the dividing line between 'artistic work' and 'design' had been equally clearly laid down. The difficulty is illustrated by references in the leading text-books on the subjects of advertisement posters and Christmas cards. Where the one (Macgillivray) regards the former as properly classified among artistic works and the latter among designs requiring registration – the other (Copinger) finds that both come within the Copyright Act as artistic works, and are automatically protected. According to the 1911 Act, 'artistic work' includes 'works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs.'<sup>2</sup>

A recent case on designs dealt with a device for conveying oil to the crank chamber of an internal combustion engine.<sup>3</sup> The article had

<sup>1</sup> Section 93.

<sup>2</sup> Section 35; see page 314 Appendix.

<sup>3</sup> *Rose v. Pickavant*, [1923] 40 R.P.C. 320.

been patented and its design registered. In an action for infringement the *patent* was held invalid for want of novelty, while the *design* was held valid and infringed by a fraudulent imitation. It was said that 'on being viewed from one angle the designs were indistinguishable'; and this illustrates sufficiently well the application of the statutory definition.<sup>1</sup>

#### REGISTRATION

The Comptroller-General of Patents Designs and Trade Marks may, upon application of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under Part II of the Patents and Designs Acts, 1907 and 1919 (consolidated). Such registration is a condition of copyright in the design.<sup>2</sup>

The proprietor of a new or original design may be (1) the person for whom the author of the design executed the work for 'good consideration'; or (2) a person who acquires the design or the right to apply the design to any article (who becomes proprietor to that extent only). In any other case 'proprietor' means the author of the design.<sup>3</sup>

#### NOVELTY OR ORIGINALITY

For a design to be validly registrable, it should be new or original, and many are the legal battles that have centred round these words.<sup>4</sup> Until 1919 the word 'and' stood in the place of the word 'or', and the change involved a subtle modification of the law, implying that now it will suffice if the design is 'new', although it is not 'original'.

One of the most frequent defences to actions for infringement of design is 'want of novelty'; and it was suggested in the combustion engine case quoted above that it might not be open to a defendant to raise this defence without a motion to rectify the register of designs by striking out the challenged design on the ground of 'want of novelty'.

The interpretation of this requirement is obviously one of the greatest difficulty, and the two following cases give the litigant on either side good ground to hope for a verdict. In the first it was said, 'There can be no originality or novelty in a design which consists of a description of the article itself as a particular arrangement of old and well known things'. And further, 'That if a design come within the definition, and is novel and original, the article complained of will not be an infringement of the design unless it is an exact reproduction, and any difference *however trivial* will protect it from being an infringement'.<sup>4</sup>

<sup>1</sup> Sections 49 and 53, 1907 Act.

<sup>2</sup> Section 93, 1907 Act.

<sup>3</sup> Section 49, 1907 Act.

<sup>4</sup> *Repetition Woodwork Co. v. Briggs*, [1924] 131 L.T. 556.

This is certainly a clear statement of the law as it is actually applied, and as a result manufacturers in many trades place a minimum of reliance on the protection offered by the Act. No blame whatever can be attributed to the draftsman of the Act, for the section on piracy reads, 'It shall not be lawful for the purposes of sale to apply the design, or any fraudulent or obvious imitation thereof, &c.'

The converse application of the law was recently seen in a very salutary judicial condemnation of the well-known practice in the textile and wall-paper trades, by which any striking design is made the subject of 'followers' in general imitation of the original, but differing in detail.

In this case (a wall-paper design) it was contended that the 'follower' was not an infringement, and further that the plaintiffs' design itself was merely a combination of older ingredients. It was held that the new combination of old ingredients constituted a new and original design, and that in spite of differing details the defendant's production was a fraudulent and obvious imitation.<sup>1</sup>

#### PRIOR PUBLICATION

It is a condition of valid registration that the design shall not have been previously published in the United Kingdom.<sup>2</sup> But by way of safeguard another section of the Act provides that any one of three things shall *not* be sufficient publication to invalidate copyright if registration is subsequently obtained.<sup>3</sup>

The first is disclosure *by the proprietor* to another person in such circumstances as would make it contrary to good faith for the latter to use or publish the design. The second is disclosure in breach of good faith by any person *other* than the proprietor. The third is the acceptance of a first and confidential order for goods bearing a new or original *textile* design intended for registration.

The wine- tonic case referred to previously in connection with Section 22 of the Copyright Act was ultimately decided on this very point,<sup>4</sup> and the further circumstances are interesting. The plaintiffs, it will be remembered, were the designers of a 'cut out' showcard advertisement for a patent wine with a nurse and a bunch of grapes. They first showed it to Winox Ltd. (the defendants) who did not give them an order. Then they showed it to the Premier Drug Co. as an advertisement for Liebig's Standard Wine. The Premier Drug Co. placed an order, and meantime the infringing design by Winox Ltd. appeared. An action was brought, and an injunction obtained in the High Court. The defendants took the case to the Court of Appeal, and obtained a reluctant reversal of the former decision on the ground

<sup>1</sup> *Wallpaper Manufacturers v. Derby Paper Staining Co.*, 42 R.P.C. 443.

<sup>2</sup> Section 49, 1907 Act.

<sup>3</sup> Section 55, 1907 Act.

<sup>4</sup> *Gumston v. Winox*, [1921] 1 Ch. 664.

that the later disclosure by the plaintiff to the Premier Drug Co. (not the first offer to themselves) was not within the three alternatives, and *thus constituted prior publication*.

Clearly the second alternative was not touched, for the disclosure was *by* the proprietor; nor yet the third, for the design was not for *textile* goods. And as to the first, it was said that seeing the Premier Drug Co. had placed a substantial order, there was no obligation laid upon them (the Drug Co.) not to tell anybody about it; and thus even this disclosure was not 'a disclosure by the proprietor to another person in such circumstances as would make it a breach of faith for the latter to publish it'.

#### DURATION AND MARKING

Copyright in a registered design extends for a period of five years only; but on application before the expiration of the term, it may be extended by two successive periods of five years each, making fifteen years in all.<sup>1</sup>

It is made a condition precedent to any recovery of a penalty or damages that the proprietor shall have caused each article to be marked in the prescribed manner denoting that the design is registered. But there is a saving clause for cases where the proprietor can show that he had taken all the proper steps to ensure the marking of the article; and also for cases where the infringing party *knew* of the existence of the copyright of design in the unmarked article.<sup>2</sup>

#### PIRACY AND PENALTY

The act of piracy consists in applying the design to any article in any class of goods in which the design is registered, and it is a piracy to do anything *with a view* to enable the design to be so applied.<sup>3</sup>

To come within the Act the infringement must be for purposes of sale; and fraudulent and obvious imitations are declared to be piracies no less than exact copies. The vendor, however, is only liable when he *knows* of the infringement contained in the goods complained of.

A person aggrieved may sue either to recover a penalty which is not to exceed £50 in respect of each contravention, or else he can sue for damages and an injunction. In no case may he recover more than £100 in respect of any one design.

The special reference to 'classes of goods' must not be overlooked. It is not a piracy within the section to take a design and use it on articles outside its class of registration.

#### GROUNDLESS THREATS OF PROCEEDINGS

An injunction can be obtained and damages recovered in cases where

<sup>1</sup> Section 53, 1907 Act, and Rules 38 to 40 of the Designs Rules, 1932.

<sup>2</sup> Section 54, 1907 Act.

<sup>3</sup> Section 60, 1907 Act.

a person is aggrieved by circulars, advertisements, &c., threatening proceedings for infringement. The plaintiff will have to prove that he has not in fact committed an infringement, and further he will not get his injunction where the other side commence and diligently prosecute their action for infringement.<sup>1</sup>

#### OTHER OFFENCES

Falsely describing a design as 'registered' is an offence for which a fine not exceeding £5 is imposed.<sup>2</sup>

The Fine Arts Copyright Act, 1862, which was repealed on the passing of the Copyright Act, 1911, with the exception of two sections dealing with certain fraudulent acts, must also be noticed. Affixing forged signatures to paintings, drawings and photographs, and offering such works for sale, are among the offences dealt with in these unrepealed sections. The maximum penalty recoverable is £10, or, alternatively, double the sale price.

Fraudulently copying or imitating paintings, &c., is similarly dealt with, and where work of this kind is altered after it has left the artist's hands it is an offence within the same category to offer the production for sale as the artist's unaltered work. The artist's right of action here is not lost by assignment of copyright.

The well-known publishers, Raphael Tuck & Co. Ltd., were defendants in a case under this section.<sup>3</sup> In 1921 they bought the copyright in two pictures for the illustration of calendars and reproduced them unaltered. In 1924 they produced them again with alterations, this time omitting the plaintiff's signature, and an injunction and penalties were sought in an action in 1926. The learned judge found that there was no representation, express or implied, that the work was the plaintiff's unaltered picture and, accordingly, she lost her case.

#### ALLOWABLE USE OF ARTISTIC WORK

In considering special cases dealing with designs, the main fact stated previously that copyright exists automatically in every 'artistic work', under the 1911 Act, must not be forgotten; nor that artistic work was defined as including works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art, and engravings and photographs.

The Act specifically allows the use of casts, plans and sketches in regard to *details* so long as the main design is not imitated. Drawings and photographs of sculptures and works of art in a *permanent public situation* are also allowed to be made, but this does not include architectural drawings of architectural works of art.<sup>4</sup>

<sup>1</sup> Section 61, 1907 Act.

<sup>2</sup> Section 89, 1907 Act.

<sup>3</sup> *Preston v. Tuck*, [1926] 1 Ch. 667.

<sup>4</sup> Section 2 (1) (ii) and Section 35; see Appendix, pages 301 and 314.

## CLARIFICATION OF LAW

Although what is said in the previous pages of this chapter represents the position at present (1948), there is prospect of an early modification of the law. A departmental committee was appointed by the Board of Trade in 1944 'to consider and report whether any, and if so what, changes are desirable in the Patents and Designs Acts and in the practice of the Patent Office and the Courts in relation to matters arising therefrom'. Its final report, presented to Parliament in September, 1947, accepted criticism of the existing definition of 'design' and of the need for clarity as between the Copyright Act and the Patents and Designs Acts.

The present Editor was among the witnesses who gave evidence before the committee, and stressed the position that under the existing Statutes a printer could not know with certainty whether he should register his design or simply rely on the Copyright Act, unless it was a design in three dimensions, such as a 'cut-out' showcard.

The seriousness of the position is that, whichever course he takes, the printer is then barred from taking the other course, and that any day a decision might be given by the Courts that that other course was the appropriate one. Till the present law is amended, printers run the risk of serious loss through lack of protection of their 'design' work against piracy. Among the leading printers who produce original design or pictorial work there is no common practice. Some register their designs (paying substantial sums in registration fees) and some do not register but rely on the automatic copyright given by the 1911 Act to 'artistic' work.

The departmental committee's summary of their principal recommendations includes the following paragraphs under the head of 'Demarcation between industrial designs and literary, &c., copyright':

'That printed and like matter primarily of a literary or artistic character should be excluded from protection under the designs sections of the Patents and Designs Acts and should rely for protection upon the Copyright Act, 1911, in so far as such matter falls within the scope of that Act.

'That when the Copyright Act, 1911, is next under revision, consideration should be given to the policy of allowing the owner of copyright in an artistic work to continue to retain his remedies under the Copyright Act after he has consented to reproduction of his work as a registered design.'

This latter recommendation was included in view of the circumstances of the *Popeye* case.<sup>1</sup>

<sup>1</sup> See page 118, *ante*

## CHAPTER TWENTY

### INTERNATIONAL COPYRIGHT

THERE are few departments of the law in which the rights accorded by foreign nations to any large class of English subjects are of more direct importance than in the law of copyright. It is, of course, impossible to give more than a brief outline of the situation in certain of its most practical aspects.

#### BERNE CONVENTION

A Convention agreed to at Berne in 1887 was the outcome of efforts to simplify the position arising from the fact that certain countries had passed a number of reciprocal treaties securing a measure of copyright for their nationals. A revised Convention was signed in Rome in 1928.

The countries concerned form the 'Copyright Union', and the most important are:

Great Britain, with some but not all of the Dominions and Colonies:

Belgium	Denmark	Holland	Switzerland
France	Norway	Spain	Japan
Germany	Sweden	Portugal	

There are special and separate copyright treaties between this country and Austria.

#### THE PRINCIPLE

The fundamental principle of the Berne Convention is expressed in Article 4: 'Authors who are citizens of any of the countries of the Union, shall enjoy in countries other than the country of origin for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws grant to natives.'

In 1912 it was enacted by Order in Council that the Copyright Act, 1911, should (with certain reservations) apply to the Copyright Union.

It must not be thought, however, that these wide measures of protection give a British subject any right of action in English Courts for *foreign* infringements, in contravention of the Convention. In 1895 a case was brought here in which one Englishman sought to restrain another from producing and performing his play in Germany; he was very properly refused his injunction, the proper place to sue being the German Courts.<sup>1</sup>

#### DURATION

An important provision of the Order is that the term or duration of

<sup>1</sup> *Morocco Bound Syndicate v. Harris*, [1895] 1 Ch. 535.



Copyright in this country is not to exceed that of the country of origin of the work.

#### NEWS AND ARTICLES

In the case of newspaper *articles* the general rule is that reproductions by other newspapers (with proper acknowledgment) are allowed unless expressly forbidden in some conspicuous part of the newspaper in which the article is published, e.g. 'Copyright throughout the World' or 'World rights reserved'. The protection of the Convention does not extend to *news* of the day, nor to miscellaneous information in the nature of news.

#### PRIOR PUBLICATION BY A NON-UNION AUTHOR

The Convention binds its signatories to give the same rights to all authors whose country is outside the Union as authors within the Union enjoy, *in cases where the work is first published in a Union country*. It is thus impossible effectively to counter the American legislation which, as will be seen, bears heavily upon the rest of the world by requiring not only *publication* in U.S.A. but the entire process of manufacture to be carried out there including the setting of the type; since an American author need only publish his work first in England to obtain full protection.

#### UNITED STATES COPYRIGHT

The United States of America are not included in the Berne Convention, and since an English author's American rights are often of greater value than his British rights, the United States law will have to be carefully considered.

For a very long period, covering most of the last century, the piracy of English literature in the United States was nothing short of an international scandal. Probably no one suffered more from this than Charles Dickens, and his outspoken attacks on this abuse in the course of his American lecture tours aroused considerable resentment.

The position to-day is so far improved that any author who feels justified in taking the necessary steps *can* obtain protection. That it is unsatisfactory from any practical viewpoint is seen by the fact that the great bulk of English literature is, in point of fact, unprotected.

#### THE PRINCIPLE

The American legislation is not framed with any sense of the value of International copyright, for no work produced outside U.S.A. can gain protection, unless it is *also* produced and published within the United States. The most important statute on the point was the Chace Act of 1891, and a number of amending and consolidating Acts have been passed since, the ruling statute being now the Copyright Act, 1909, with amendments passed in 1912, 1914 and 1919.

## DURATION

American copyright runs for a maximum of fifty-six years, but certain formalities have to be observed at the end of the first twenty-eight years to secure protection for the full period.

## SPECIAL REQUIREMENTS OF UNITED STATES COPYRIGHT

The special requirements are, first, a 'copyright notice' upon the title page or following page of a book; next registration and deposit of one copy at the Copyright Office; further the general law is that the work must be published in America either first or at least contemporaneously with publication elsewhere. A special interim protection may, however, be obtained for English works by deposit within sixty days after publication abroad, of one complete copy of the English edition, with a request for reservation of copyright; and this protection runs for four months from the date of deposit.

The regulations mentioned hitherto are not unreasonable, but a further provision renders much of this quite nugatory.

This is the notorious 'manufacturing and typesetting clause', *which applies exclusively to work in the English language*. This clause requires the books for which copyright is to be obtained to be printed from type set up within the United States and the binding and the whole of the manufacture must be carried out there. It has long been hoped that the U.S.A. law and, in particular, this oppressive 'manufacturing clause' would be amended, and that the United States would join the Copyright Union. There is some support in America for the view that there should be a change, but the trade union interests have made it clear that they wish the existing restrictions maintained.

## COLONIAL COPYRIGHT

The Copyright Act, 1911, has been extended by Order in Council to all the Colonies, but not to the self-governing Dominions.

Australia, New Zealand and Newfoundland have adopted the Act with certain reservations. South Africa was somewhat later in falling into line, but in 1916 an Act was placed upon the Statute-book of the Union bringing the English Copyright Act into force in its entirety.

The general rule in the Copyright Act, 1911, in this connection is, that in self-governing dominions to which that Act does not extend the former copyright enactments dealing with Imperial copyright are to continue in force unless and until they are repealed locally.<sup>1</sup>

The principal provision of the old law on this point was contained in the Copyright Act, 1842, which gave *Imperial rights* to persons acquiring copyright by first publication in the United Kingdom.

## CANADA

The Canadian position is somewhat difficult. Canadian Acts of 1875

<sup>1</sup> Section 26 (2): see page 311 Appendix.

and 1886 give copyright to certain persons and on certain conditions for a term of twenty-eight years renewable for a further fourteen years. The persons eligible are persons domiciled in Canada and the British Dominions, and citizens of countries in the Copyright Union. The conditions are analogous to those in force in U.S.A. and require local manufacture (but the type need not actually be set up in Canada), registration, deposit and notification of copyright on the title page. Interim copyright can also be obtained.

#### DUAL POSITION

*Apart from this*, however, Imperial copyright subsists under the 1842 Act, and for many years Canada found herself flooded with importations from England and America, while the Berne Convention only intensified her difficulties by enlarging the field of her competitors.

In 1900 she therefore passed a further Act giving power to exclude work which is copyright in Canada, and has previously been published elsewhere in the British Dominions. It has been suggested that this measure was unconstitutional, since Section 26 (2) of the Copyright Act, 1911, kept alive the 1842 Act with its Imperial Copyright for such Dominions as did not adopt the new Statute of 1911. Further legislation was badly needed to rectify the anomalies of the situation, but it was clear that no English-speaking neighbour of the United States could for a moment consider adopting the principles of the Berne Convention in their full application.

#### THE 1914 PROTOCOL

A Protocol to the Berne Convention in 1914 was of importance to Canada, inasmuch as it gave Union countries the right to reserve the necessary protection against abuses by non-union countries (of which U.S.A. is the chief). The gist of the document is to the effect that members of the Copyright Union are to be free to impose restrictions, in respect of the work of authors belonging to non-union countries, in cases where those countries do not give adequate protection to authors within the union.

#### CANADIAN ADHERENCE TO CONVENTION

Accordingly, in 1923, the adherence of Canada to the Revised Convention of Berne, 1908, was declared, subject to a restriction in regard to the United States of America. The following passage in the revised Convention is of particular importance: '*Apart from express stipulations, the extent of protection, as well as the means of redress, shall be governed exclusively by the laws of the country where the protection is claimed.*' This ensures to Canada the continuity of her internal regulations, while adherence to the Convention will form an effective check to piracies in other countries.

## TRANSLATIONS

Under the Copyright Act, 1911, the sole right to translate is included within the author's copyright;<sup>1</sup> but without prejudice to this, a translation is entitled to protection as an 'original literary work'.<sup>2</sup> Further, under the revised Berne Convention authors enjoy full translation rights for the whole term of their right in the original work, provided such work was first published within the Union.

In an interesting case on this point which is, however, not of recent date, a French play called *Frou-Frou* was reproduced as an English play *Like to Like* with considerable alterations and omissions. The English adaptation was registered by the plaintiff, and the defendant proceeded to stage the French original. An action was brought but the protection sought for the English piece was refused upon the ground that the translation was not accurate.<sup>3</sup> Some twenty years later it was held that a translation need not be absolutely literal, provided it was substantially a translation<sup>4</sup>, and it may well be that to-day the law would be applied even more widely.

<sup>1</sup> Section 1 (2) (a); see page 300 Appendix.

<sup>2</sup> *Byrne v. Statist Co.*, [1914] 1 K.B. 622.

<sup>3</sup> *Wood v. Chart* (1870), 39 L.J.Ch. 641.

<sup>4</sup> *Lauri v. Renad*, [1892] 3 Ch. 402.

## CHAPTER TWENTY-ONE

### ILLEGAL PUBLICATIONS AND PRINTS

#### I. FICTITIOUS STAMPS, INDECENT PUBLICATIONS, &c.

THERE are many unlawful publications, apart from those within the scope of the following chapters. Libels and infringements of copyright, for example, have been dealt with under their respective headings; certain statements contained in company prospectuses will, if untrue, enable subscribers to claim compensation from the directors. And apart from these special cases, there are many other statements which render the person making them liable for the loss or damage suffered by other people.

#### PUBLICATIONS AGAINST PUBLIC POLICY

Even where there is no liability for damages, the circumstances may be such as to render the making or withholding of certain statements objectionable upon grounds of public policy. Thus there was a case<sup>1</sup> where the plaintiff, who was a director of a Canadian land company, entered into an agreement with the defendants who were proprietors of a weekly newspaper which purported to give advice to purchasers of Canadian land. Under this agreement the plaintiff was to forgive the defendants one-half of a debt of £1,490, and the latter undertook to publish no comments upon the plaintiff's land company. Upon breach of this agreement an action was brought to recover the balance of the money and it was held that the agreement was unenforceable on this ground amongst others – that the undertaking was void as being against public policy, inasmuch as it was not consistent with the proper conduct of the newspaper in the public interest.

#### POST OFFICE PROHIBITIONS

The Inland Post Warrant of 1947 contains the following:

‘There shall not be posted, or conveyed, or delivered by post any postal packet –

‘Consisting of or containing any indecent or obscene print, photograph, lithograph, engraving, book, card or written communication, or an indecent or obscene article:

‘Having thereon or on the cover thereof any words, marks, or designs of indecent, obscene, or grossly offensive character;

‘Having thereon or on the cover words, letters, or marks (used without due authority) which imply that the postal packet is sent on His Majesty's Service;

<sup>1</sup> *Neville v. Dominion of Canada News*, [1915] 3 K.B. 556.

‘Having thereon or on the cover thereof any words, marks, or designs of a character likely to embarrass the Officers of the Post Office in dealing with the packet in the post.’

#### TRANSMITTING INDECENT MATTER BY POST

The above regulations are made under powers contained in the Post Office Act, 1908, which also specifically prohibits the transmission of such productions, and provides a fine of £10 on summary conviction, or imprisonment for not more than twelve months on conviction on indictment.<sup>1</sup>

It appears that a newspaper editor who advertises indecent productions, so that readers may obtain them through the post, may also be convicted under the Act.<sup>2</sup>

The importation into the United Kingdom of indecent or obscene prints, photographs, books, &c., by post or otherwise, is prohibited by the Customs Laws Consolidation Act, 1876.<sup>3</sup>

#### FICTITIOUS POSTAL STAMPS

There was in the Post Office Act, 1908, a general prohibition of fictitious stamps, but this was relaxed by the Post Office (Amendment) Act, 1935. The expression ‘fictitious stamp’ was defined in the latter Act as meaning ‘any facsimile, imitation or representation, whether on paper or otherwise, of any stamp for the time being authorised or required to be used for the purpose of the Post Office or of any stamp for denoting a current rate of postage of any country outside the British Islands’.

The 1935 Act authorised the issue of regulations making it lawful, subject to conditions to be prescribed by the regulations, to make a fictitious stamp or a die, plate, instrument or materials for making such a stamp, and declared that the general prohibition in the 1908 Act was to remain effective subject to any such regulations. The Fictitious Stamps Regulations, 1937, were issued by the Treasury under the powers given in the two Acts.<sup>4</sup> These superseded earlier regulations issued by the Postmaster General.

The main provisions of the regulations are (a) that the purposes for which fictitious postage stamps or ‘postage paid’ stamps may be made, sold or possessed are the illustration of such publications, articles or advertisements relating to stamps as shall be approved by the Postmaster-General, (b) that as regards fictitious stamps other than obsolete fictitious stamps the reproduction must be in black colour or (where the photogravure process is used) a dark blue or black monotone

<sup>1</sup> Sections 16 and 63.

<sup>2</sup> *R. v. De Marny*, [1907] 1 K.B. 388.

<sup>3</sup> Section 42.

<sup>4</sup> S.R. & O. 1937 No. 458.

colour only, and (c) that no facsimile, imitation or representation of any current stamp used by the Post Office may be used in any advertisement.

A person may not make or possess any die, plate, instrument or materials for making fictitious stamps, or print any such stamps except with the authority of the Postmaster-General and subject to conditions specified in a schedule attached to the regulations, but this does not apply to an obsolete fictitious stamp (defined as meaning a fictitious stamp, pertaining to an issue of any country outside the British Islands, which is not a current stamp for denoting a rate of postage).

#### SELLING INDECENT BOOKS, ETC.

The Town Police Clauses Act, 1847,<sup>1</sup> makes it an offence punishable by a fine of 40s. or fourteen days' imprisonment, 'publicly to offer for sale or distribution, or to exhibit to public view any profane, indecent or obscene book, paper, print, drawing, painting or representation'.

Where complaint on oath has been made to a Bench of Justices, that obscene matter is kept in any house for the purpose of sale, they may give authority by special warrant for breaking in and searching, under the Obscene Publications Act, 1857.<sup>2</sup>

If the publication is in fact obscene, an offence is committed although there may have been no intent on the part of the publisher to corrupt morals.<sup>3</sup>

#### EXPOSING INDECENT MATTER

The offence of exposing, independently of selling, is dealt with by the Vagrancy Acts of 1824<sup>4</sup> and 1838,<sup>5</sup> and also by the Indecent Advertisements Act, 1889.<sup>6</sup>

The Vagrancy Laws mentioned make it an offence 'wilfully to expose to view in any street, or public place, or in the window or other part of any shop or other building situate in any street or public place, any obscene print, picture, or other indecent exhibitions'.

The Act of 1839 makes it an offence (40s. or one month) to affix indecent matter to any house, board, tree, &c., so as to be visible to any person passing, or delivering the same to persons passing, or throwing such matter down the area of any house, or exhibiting it to public view in any window.

It is a more serious offence to employ other people to do the prohibited distribution, and accordingly this is punishable with a fine of £5 or three months' imprisonment.

<sup>1</sup> Section 28.

<sup>2</sup> Section 1.

<sup>3</sup> *R. v. Hicklin* (1868), L.R. 3 Q.B. 360.

<sup>4</sup> Section 4.

<sup>5</sup> Section 2.

<sup>6</sup> Sections 3-5.

Advertisements relating to venereal disease are deemed to be indecent matter within the meaning of this Act, if affixed to any house, &c., so as to be visible to any person passing.

The Venereal Disease Act of 1917 makes it an offence to advertise treatments or remedies for these complaints, other than notifications authorised by Local Government Boards, and professional publications. The maximum punishments are £100 fine or two years' imprisonment.

It is interesting to notice that in 1926 it was said by a representative of the Director of Public Prosecutions that cases under this Act were extremely infrequent, and that previous to the case in which he was then acting he had only had one similar prosecution.<sup>1</sup>

#### PRINTING AND PUBLISHING INDECENT MATTER

It seems not a little remarkable that whereas almost every conceivable public dealing with indecent printed matter is a statutory offence, the actual printing is not. It is, however, a common law misdemeanour to *publish* indecent matter tending to deprave and corrupt.<sup>2</sup> And when the natural effect of the publication is of this kind, it is entirely beside the mark for the defendant to say that the publication was for a salutary purpose and not for purposes of gain.

The case last quoted was an example of this, dealing as it did with a pamphlet called 'The Confessional Unmasked', an anti-Catholic polemic, a part of which detailed the questions on matters of sex which were said to be administered in the confessional.

Medical books, on the other hand, will always be excepted, since they are published for a particular and not a general purpose, and it would be ridiculous to suggest that they had a corrupting tendency.

At common law the fact of printing will constitute 'publication', and apart from the question of this criminal offence, any contract to print indecent matter is against public policy and unenforceable.

#### FORTUNE-TELLING

Pretending or professing to tell fortunes, and to do palmistry, are offences against the Vagrancy Act, 1824,<sup>3</sup> and the defendant's bona fide belief in his powers is no answer.<sup>4</sup> Offering by advertisements in newspapers to 'cast nativities' and so forth, is sufficient evidence of pretending to tell fortunes without further proof of actual communications.<sup>5</sup>

<sup>1</sup> [1926] 23rd June, *Times* newspaper.

<sup>2</sup> *R. v. Hicklin* (1868), L.R. 3 Q.B. 360.

<sup>3</sup> Section 4.

<sup>4</sup> *Stonehouse v. Masson*, [1921] 2 K.B. 818.

<sup>5</sup> *Penny v. Hanson* (1887), 18 Q.B.D. 478.



## CHAPTER TWENTY-TWO

### ILLEGAL PUBLICATIONS AND PRINTS (*contd.*)

#### II. LOTTERIES AND MISCELLANEOUS COMPETITIONS

THE largest and most important body of law relating to illegal publications is unquestionably on the subject of gambling in one form or another. Since the days of Queen Anne, no less than a score of Acts of Parliament have been placed upon the Statute Book dealing with gaming and lotteries, so that legislation on the subject was, for some time prior to the Betting and Lotteries Act of 1934, somewhat chaotic.

To bring the subject within a manageable compass it is essential to omit as far as possible all reference to the law except as regards printed publications, and it may then be conveniently dealt with in the following order:

Lotteries Acts since 1721; Competitions in general; Advertising schemes; Betting and Lotteries Act, 1934; Racing competitions; Betting advertisements; Ready-money football betting; Circulars.

#### LOTTERIES ACTS SINCE 1721

A lottery is a scheme for distributing prizes by lot or chance<sup>1</sup>, a payment being made for the chance, and a competition which falls within this definition usually comes within the Lottery Acts. A recent decision on the element of chance was based on an Act of 1823 that was repealed in 1934.

The first Lottery Act which made it an offence to print, publish and advertise proposals for lotteries was passed in 1721, and the enormous penalty of £500 was provided, in addition to a year's imprisonment. That Act was repealed by the Betting and Lotteries Act, 1934, which is referred to in detail later in this chapter.

The next Lottery Act, passed the following year (1722), was intended to prevent foreign lotteries being carried on in the kingdom; the penalties for printing or publishing proposals or schemes, or selling or disposing of tickets, were similar to those in the previous Act, except that the sum to be forfeited was only £200. This was partly repealed and an Act of 1932 on lotteries was entirely repealed, both by the 1934 Act.

Printing and publishing proposals or schemes for raffles are offences under the Gaming Act, 1738, the penalty being £200. This Act was partly repealed by the 1934 Act.

<sup>1</sup> *Taylor v. Smetten* (1883), 11 Q.B.D. 207.

A number of other Acts deal with these offences, and there has been an extraordinary amount of overlapping. Thus it is an offence by writing or printing to publish the setting up of a lottery with the intent to have such lottery drawn (Lotteries Act, 1736, penalty £100); and to import notices or advertisements of lotteries intended for distribution in this country (Revenue Act, 1898), but several Acts between 1736 and 1898 which were in force up to 1934, imposing penalties on the publishing of lottery proposals, were repealed by the Act of that year.

In addition to this heterogeneous mass of prohibitions specifically directed against printers, publishers and distributors, there are, of course, those directed against the main offences of actually holding lotteries, illegal games, raffles, &c., and printers and publishers are once more liable under these main prohibitions, as 'aiders and abettors'. They are also subject to penalties for specific offences under the Ready Money Football Betting Act, 1920,<sup>1</sup> and the Betting and Lotteries Act, 1934.<sup>2</sup>

#### COMPETITIONS IN GENERAL

It is no doubt sufficiently well understood that ordinary lotteries, where the money prizes are provided by the sale of tickets (with the exceptions now allowed by the 1934 Act<sup>2</sup>) are not tolerated in this country. The difficulty arises in connection with the games and competitions which are 'deemed to be lotteries', and a number of these cases will now be considered.

A clear distinction must be drawn between competitions based upon the selection of winning horses or football teams, where skill is involved and such chance as enters does not arise within the promoter's office, on the one hand, and, on the other, 'Missing Word' and 'Limerick' competitions where, although again skill contributes to the result, yet the final *selection* by the promoter of the winning competitor may be in some way a matter of chance.

Competitions of the former type may or may not be offences against the Betting Acts, and will be dealt with later, as they do not ordinarily infringe the Lottery Acts. Competitions of the latter kind cannot be betting offences, but not infrequently they do constitute lotteries.

#### MISSING WORD COMPETITIONS

A case that is frequently quoted in this connection was decided as long ago as 1893<sup>3</sup>. Here a paragraph in a newspaper was printed without the last word, and readers were invited to fill in a coupon with the correct word and send it in, together with one shilling. The promoter

<sup>1</sup> *Post*, page 148.

<sup>2</sup> *Post*, page 139.

<sup>3</sup> *Barclay v. Pearson*, [1893] 2 Ch. 154: and see page 146, *post*.

said that the winning word was in one of a number of sealed envelopes, each containing a suitable word, and in the hands of a chartered accountant, and that the choice of the winning word would be by hazard, after the competition had closed; and, further, he said that the whole of the entrance money would be distributed in prizes. The successful competitors having commenced an action-at-law for their winnings, it was held that the competition was illegal and a lottery, and that *all competitors* were entitled to the return of their entrance money provided they had given notice of their claim before the money was distributed.

#### LIMERICKS

The enormous popularity of these competitions forty years ago is only equalled by the present rage for crossword puzzles. At that time, however, it was not yet realised that the competitions themselves provided an ample attraction for an idle public, and that prizes are, in point of fact, superfluous.

The limerick competitions consisted in the invention of a clever concluding line to a doggerel verse, and in the case now quoted<sup>1</sup> no less than £300 was offered by the enterprising publisher for the best 'last line'. The entrance fee was sixpence and it was advertised that every coupon would be examined by a competent staff. In due course, the winning effort was disclosed with the competitor's name. Another competitor then came forward and claimed to have sent in exactly the same line and sued for the £300. It was held in judgment that the competition was a lottery and the action was not maintainable.

#### COLLATERAL CONTRACTS

Limerick competitions being lotteries and illegal, it follows that, as lawyers say, 'collateral contracts are also tainted'. Thus where such a competition was used as part of an advertising scheme undertaken by a certain firm, and the advertising agents sued the firm for the cost of inserting the advertisements, it was held that they were not entitled to recover, having themselves taken part in an illegal act.<sup>2</sup>

#### THE PRINCIPLE INVOLVED

These decisions no doubt depended largely on the fact that this form of competition was so popular and the number of entries so enormous that fair judging was regarded as physically impossible, and an element of pure chance entered to a great extent in the selection of the winner.

On these grounds only can it be possible to reconcile another decision<sup>3</sup> where the competition was to construct a sentence illustrating a given

<sup>1</sup> *Blyth v. Hulton*, [1908] 24 T.L.R. 719.

<sup>2</sup> *Smith's Advertising Agency v. Leeds Laboratory Co.*, [1910] 26 T.L.R. 335.

<sup>3</sup> *Scott v. Director of Public Prosecutions*, [1914] 2 K.B. 868.

word. The initial letter of each word in the sentence was to be a letter taken from the given word. A prosecution having been initiated by the police, it was held that as some degree of skill was involved, and as the number of competitors was not such as to make individual consideration impossible, the result did not depend entirely upon chance and the competition was not a lottery.

It is worthy of notice that this decision was given in 1914 and, being several years later than the limerick trials, it may be said to embody a later development and, possibly, a modification of the judicial views on the point.

A competition for the correct prediction of the number of births and deaths in London during a given week has also been held not to constitute a lottery.<sup>1</sup>

#### GRATUITOUS CHANCES

A further important element in the illegality of competitions where the result depends upon chance is the existence of entrance fees. In one case Mr. Justice Darling (as he then was) said: 'I wish it to be clearly understood that I am not prepared to hold that an absolutely free and gratuitous distribution of chances, none of which have been paid for, would be a lottery.'<sup>2</sup> And it has been said that 'as to prize competitions by newspaper proprietors, the question is whether the competitions are schemes by which men risk money and, if successful, gain money by chance. If so they are lotteries.'<sup>3</sup>

#### ADVERTISING SCHEMES

Many newspaper advertising schemes have infringed the Lottery Acts apart from competitions. The case decided by Lord Darling which has already been referred to was of this kind.<sup>4</sup> Here a popular weekly distributed among the public gratuitously a quantity of numbered discs each one of which bore the words 'Keep this, it may be worth £100; see such-and-such a newspaper published to-day'.

The winning numbers were published in the newspaper, but the information could also be obtained *without charge* upon inquiry at the publisher's offices. It was held that although any one individual might obtain a prize without paying anything, yet the prize-money was indirectly made up from contributions by the holders of the discs and the scheme was a lottery.

It has been held also that the offence may be committed where the prizes are presented, and have not been purchased out of the entrance money.<sup>5</sup>

<sup>1</sup> *Hall v. Cox*, [1899] 1 Q.B. 198.

<sup>2</sup> *Willis v. Young & Stenbridge*, [1907] 1 K.B. 448.

<sup>3</sup> *Stone's Justices' Manual (Lotteries)*.

<sup>4</sup> *Willis v. Young & Stenbridge*, [1907] 1 K.B. 448.

<sup>5</sup> *Bartlett v. Parker*, [1912] 2 K.B. 497.

Similarly, a scheme in which a newspaper printed 'spots' of varying sizes and shapes, and offered prizes to readers who cut out and sent in the winning 'spots' was declared a lottery; and the promoter was convicted as a 'rogue and vagabond',<sup>1</sup> although no money was paid beyond the price of the newspaper.

An important 1925 decision illustrated a further point. Here a publisher arranged that numbered tickets should be given to the purchasers of goods at certain shops, the winning numbers being drawn by chance and published periodically in his newspaper. There were money prizes, and the winners had to undertake to exhibit a card advertising the newspaper in the windows of their houses for a fixed time.

On these facts it was held: first, that although the price of the goods was not increased, yet that price now included a chance in the newspaper scheme, and this constituted a sale of tickets; and, secondly, the fact that the winners were obliged to render a service to the newspaper proprietor did not prevent the scheme being a lottery, since they had already been selected as prize-winners entirely by chance.<sup>2</sup>

The Betting and Lotteries Act, 1934,<sup>3</sup> introduced a general prohibition of advertisements of lotteries other than those exempted by that Act, but did not prohibit advertisements of prize competitions involving skill.

#### RECOVERY OF THE PRIZE

It has been seen in the missing-word competition case<sup>4</sup> that where the competition constitutes a lottery or infringes the Gaming Acts or the Betting and Lotteries Act,<sup>5</sup> the prize is not recoverable at law. In other cases, however, there is a good contract, and the fixed sum can be sued for.

Thus, many years ago when influenza was apparently as much a scourge as it is to-day, an enterprising chemist offered for sale a preventive preparation called the 'Carbolic Smoke Ball'. Such faith had he in this specific that he undertook to pay no less than £100 to any person who should become a victim to the fell disease within a fixed time after using the smoke ball. The plaintiff carried out all instructions but, nevertheless, contracted influenza. It was held that she had made a good contract; that she had accepted the advertised offer by acting upon it; that the contract was not a wager, and the money was recoverable.<sup>6</sup>

<sup>1</sup> *Hall v. McWilliam*, [1901] 85 L.T. 239.

<sup>2</sup> *Kerslake v. Knight*, [1925] 41 T.L.R. 555.

<sup>3</sup> See page 139, *post*.

<sup>4</sup> *Barclay v. Pearson*, [1893] 2 Ch. 154. See page 135, *ante*.

<sup>5</sup> See page 139, *post*.

<sup>6</sup> *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q.B. 484.

# INFORMATION CONCERNING LOTTERIES AND BETTING

Publishing schemes for the sale of lottery tickets is, it will be remembered, a grave offence, quite apart from promoting the lottery, and the prohibition was repeated in the 1934 Act.<sup>1</sup> Where a newspaper article merely criticised a sweepstake in a favourable manner, giving information as to where tickets could be obtained and the prices, this was held not to constitute 'publishing a proposal' contrary to the Lotteries Act, 1823, and neither the editor nor the proprietor was liable,<sup>2</sup> but such an article published now would appear to be an offence against the 1934 Act.

## UNREASONABLE BY-LAW

Where a County Council has passed a by-law making it an offence to use any public place for the purpose of selling any paper devoted mainly to giving information as to the probable result of races, steeple-chases, or other competitions, it was held that this by-law was unreasonable and could not be supported.<sup>3</sup>

## PUBLICATION

Where the proposal and scheme are illegal, very little will suffice to constitute publication. Thus where sweepstake circulars were ordered from a master printer and delivered enclosed in envelopes, it was held that the scheme had been published to his own workpeople and the offence had been committed.<sup>4</sup>

## BETTING AND LOTTERIES ACT, 1934

The Act that now mainly governs lotteries and prize competitions is the Betting and Lotteries Act, 1934, which, as mentioned above, repealed many, but not all, of the older Statutes and amended certain of them. It is divided into three parts, (1) Betting, (2) Lotteries and Prize Competitions, and (3) General. Part I does not concern printers or publishers as such, but Part II contains prohibitions and exemptions that specifically concern them and must be given here in detail. Prosecution for offences against the Lotteries provisions of this Act are frequent, resulting in fines being imposed on printers.

### (A) LOTTERIES

Section 21 declares that, subject to the provisions of Part II, all lotteries are unlawful.

Section 22 states that every person who in connection with any lottery promoted or proposed to be promoted either in Great Britain or elsewhere does any of the following acts shall be guilty of an offence:

<sup>1</sup> See page 140, *post*.

<sup>2</sup> *Bottomley v. Director of Public Prosecutions*, [1914] 31 T.L.R. 58.

<sup>3</sup> *Scott v. Pilliner*, [1904] 2 K.B. 855.

<sup>4</sup> *Dew v. Director of Public Prosecutions*, [1920] 124 L.T. 246.

- (a) prints any tickets for use in the lottery; or
- (b) sells or distributes, or offers or advertises for sale or distribution, or has in his possession for the purpose of sale or distribution, any tickets or chances in the lottery; or
- (c) prints, publishes or distributes, or has in his possession for the purpose of publication or distribution –
  - (i) any advertisement of the lottery; or
  - (ii) any list (whether complete or not) of prize-winners or winning tickets in the lottery; or
  - (iii) any such matter descriptive of the drawing or intended drawing of the lottery, or otherwise relating to the lottery as is calculated to act as an inducement to persons to participate in that lottery or in other lotteries; or
- (d) brings, or invites any person to send, into Great Britain for the purpose of sale or distribution any ticket in, or advertisement of, the lottery; or
- (e) sends, or attempts to send out of Great Britain any money or valuable thing received in respect of the sale or distribution, or any document recording the sale or distribution, or the identity of the holder, of any ticket or chance in the lottery; or
- (f) uses any premises, or causes or knowingly permits any premises to be used, for purposes connected with the promotion or conduct of the lottery; or
- (g) causes, procures or attempts to procure any person to do any of the above-mentioned acts.

Following this general prohibition against the printing or publishing of lottery tickets or advertisements, &c., there is a proviso that in any proceedings instituted it shall be a defence to prove that the lottery was one of those exempted by subsequent sections as 'not unlawful'. Proceedings under paragraph (c) (iii) above in respect of any matter published in a newspaper may only be instituted by, or by direction of, the Director of Public Prosecutions.<sup>1</sup> References to printing are to be construed as 'including references to writing and other modes of representing or reproducing words in a visible form'.<sup>2</sup>

#### (B) EXEMPTED LOTTERIES

(1) *Lotteries incidental to certain entertainments.*<sup>3</sup> The entertainments to which this exemption applies are 'bazaars, sales of work, fêtes and other

<sup>1</sup> Section 22 (3).

<sup>2</sup> Section 28.

<sup>3</sup> Section 23.

entertainments of a similar character, whether limited to one day or extending over two or more days. A lottery promoted as an incident of such an entertainment is to 'be deemed not to be an unlawful lottery', but the following conditions must be observed:

- (a) the whole proceeds of the entertainment (including the proceeds of the lottery) after certain deductions are to be devoted to purposes other than private gain. The deductions allowed are: (1) the expenses of the entertainment, excluding expenses incurred in connection with the lottery; and (2) the expenses incurred in printing tickets in the lottery; and (3) such sum (if any) not exceeding £10 as the promoters of the lottery think fit to appropriate on account of any expenses incurred by them in purchasing prizes in the lottery.
  - (b) none of the prizes shall be money prizes;
  - (c) tickets or chances in the lottery shall not be sold or issued, nor shall the result of the lottery be declared, except on the premises on which the entertainment takes place and during the progress of the entertainment; and
  - (d) the facilities afforded for participating in lotteries shall not be the only, or the only substantial, inducement to persons to attend the entertainment.
- (2) *Private Lotteries*.<sup>1</sup> 'In this section the expression "private lottery" means a lottery in Great Britain which is promoted for, and in which the sale of tickets or chances by the promoters is confined to, either:
- (a) members of one society established and conducted for purposes not connected with gaming, wagering or lotteries; or
  - (b) persons all of whom work on the same premises; or
  - (c) persons all of whom reside on the same premises,

and which is promoted by persons each of whom is a person to whom under the foregoing provisions tickets or chances may be sold by the promoters and, in the case of a lottery promoted for the members of a society, is a person authorised in writing by the governing body of the society to promote the lottery.'

The expression 'society' includes a club, institution, organisation or other association of persons by whatever name called, and each local or affiliated branch or section of a society shall be regarded as a separate and distinct society.

A 'private lottery' is to 'be deemed not to be an unlawful lottery', but its promotion and conduct are to be subject to the following conditions:

- (a) the whole proceeds, after deducting only expenses of printing and stationery are to be devoted to the provision of prizes, or, in the

<sup>1</sup> Section 24.



case of a lottery promoted for the members of a society, are to be devoted to prizes or to 'purposes which are purposes of the society', or in part to prizes and the remainder to such purposes;

- (b) there may not be exhibited, published or distributed any written notice or advertisement of the lottery other than (1) a notice exhibited on the premises of the society for whose members it is promoted, or, as the case may be, on the premises on which the persons for whom it is promoted work or reside; and (2) such announcement or advertisement thereof as is contained in the tickets, if any;
- (c) the price of every ticket or chance shall be the same and the price of any ticket shall be stated on the ticket;
- (d) every ticket shall bear upon the face of it the names and addresses of each of the promoters and a statement of the persons to whom the sale of tickets or chances by the promoters is restricted, and a statement that no prize won in the lottery shall be paid or delivered by the promoters to any person other than the person to whom the winning ticket or chance was sold by them, and no prize shall be paid or delivered except in accordance with that statement;
- (e) no ticket or chance shall be issued or allotted by the promoters except by way of sale and upon receipt of the full price thereof, and no money or valuable thing so received by a promoter shall in any circumstances be returned; and
- (f) no tickets in the lottery shall be sent through the post.

If any of the conditions specified under (a) to (f) above is broken, each of the promoters of the lottery will be guilty of an offence; and where the person by whom the condition is broken is not one of the promoters, that person also will be guilty of an offence.<sup>1</sup> It will be observed that the sub-section here referred to places a special responsibility on the printer of the tickets in respect of any offence under heads (c), (d) and (f).

#### (C) RESTRICTION ON CERTAIN PRIZE COMPETITIONS

The 1934 Act also states<sup>2</sup> that it shall be unlawful to conduct in or through any newspaper, or in connection with any trade or business or the sale of any article to the public:

- (a) any competition in which prizes are offered for forecasts of the result either of a future event, or of a past event the result of which is not yet ascertained or not yet generally known; or
- (b) any other competition success in which does not depend to a substantial degree upon the exercise of skill.

<sup>1</sup> Section 24 (3).

<sup>2</sup> Section 26 (1).

There follows a proviso with respect to the conducting of competitions in connection with a trade or business, to the effect that the prohibition shall not apply in relation to *pari-mutuel* or pool betting operations carried on by a person whose only trade or business is that of a book-maker as defined in the Act.

A football pool is not illegal as such. On the other hand, the forecasting of the three teams that would score the most goals in any week was held to be 'a lottery of the clearest description'. Where a football pool was advertised in a newspaper, to be decided on forecasts of the results of matches, the question arose whether it was a prize competition under Section 26 (1) (a). It was held that the pool as conducted by the respondent company was a competition in which prizes were offered for forecasts of the result of a future event and was therefore an offence under the subsection.<sup>1</sup>

<sup>1</sup> *Bretherton v. United Kingdom Totalisator Co.*, 114 L.J.K.B. 517; [1945] K.B. 555; also *Elderton v. same respondent*, [1945] 2 A.E.R. 625.

## CHAPTER TWENTY-THREE

### ILLEGAL PUBLICATIONS AND PRINTS (*contd.*)

#### II. LOTTERIES AND MISCELLANEOUS COMPETITIONS (*contd.*)

##### RACING COMPETITIONS

As soon as one turns from competitions of the 'missing word' type, to racing competitions, the legal situation changes. In most cases the racing competition is not a lottery, but it may be affected by the Gaming and Betting Acts; or it is possible that the offence of 'keeping or advertising a betting-house' has been committed.

Racing and football competitions are, it need hardly be explained, for the best selections of the winners of coming events. A *sweepstake* on the result of the Derby, organised by a licensed victualler in a public-house, is essentially different from these competitions, and has been held to constitute a lottery.<sup>1</sup>

The following cases illustrate the primary distinction between racing competitions and those discussed in the last chapter:

A coupon competition promoted by the proprietor of a racing newspaper for best selections of the winners of six races was held not to be an offence against either the Betting Acts or the Lottery Acts.<sup>2</sup> Here, *no money* had to be sent in with the coupons, and the bulk of the papers were distributed in the ordinary way by newsvendors, very few being sold direct by the promoter.

The next case sails somewhat closer to the wind, and a conviction might have been recorded if the case had been fought on other grounds. A prize of £100 was offered by the newspaper for correct forecasts of the names of the first four horses in a coming race. Coupons were to be used and were printed in the issue in question, but *additional coupons were also obtainable* by themselves at the price of one penny. The Queen's Bench Division held that 'picking out the winners' was not a matter of pure chance and was not a lottery.<sup>3</sup>

##### THE BETTING ACTS

Before considering racing competitions any further it will be necessary to examine certain provisions of the Betting Acts; and it may be as well to observe here that while the law does not *sanction* betting, it nowhere declares it to be illegal (whereas promoting lotteries other than certain restricted ones allowed by the 1934 Act<sup>4</sup> is criminal).

<sup>1</sup> *R. v. Hobbs*, [1898] 2 Q.B. 647.

<sup>2</sup> *Caminada v. Hulton*, [1891] 64 L.T. 572.

<sup>3</sup> *Stoddart v. Sagar*, [1895] 2 Q.B. 474.

<sup>4</sup> See page 139.

All the law does is to condemn betting as carried on under certain specified conditions.<sup>1</sup>

By the Betting Act of 1853, 'no house, office, or other *place* is to be kept for the purpose of any person conducting the business thereof betting with persons resorting thereto; or for the purpose of any money being received by such person as consideration for an agreement to pay thereafter money on any contingency relating to a horse-race, fight, game, sport or exercise'. A fine of £100 and six months' imprisonment are the maximum punishments.

It is also an offence under the same statute to exhibit or publish placards, handbills or advertisements of betting houses; penalty £50 and two months' imprisonment.

The Act of 1874 was passed to amend the one just considered, and adds the following offences of the section which deals with advertisements – viz. the sending or publishing of any letter, circular, telegram, handbill or advertisement:

- (1) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information for the purpose of such betting as is mentioned in the principal Act, or will make bets.
- (2) With intent to induce persons to apply at any house, office, or place for similar purposes.
- (3) Inviting persons to take a share in a bet or wager.

#### THE GAMING ACTS

These specific criminal offences connected with betting are not of themselves sufficient to *invalidate* betting contracts, so as to make bets irrecoverable by law, but this is achieved by the Gaming Acts of 1835, 1845 and 1892.

The first of these makes it law that securities given on gaming contracts are deemed to have been accepted *for an illegal consideration*.

The second makes all gaming and wagering contracts *null and void*; while the third Act deals similarly with collateral agreements to pay fees and commissions.

#### STAKE-HOLDERS

No action is to be brought for recovering any sum of money alleged to be won upon any wager; but it has been decided that where money has been placed with a stake-holder it *is* recoverable at law by the person who deposited it, unless it had already been paid over to the winner at the time the authority to pay was withdrawn.<sup>2</sup>

It has always seemed to the present writers to be hopeless to attempt to reconcile this and earlier decisions with the words of Section 18 of

<sup>1</sup> *R. v. Brown*, [1895] 1 Q.B. 119.

<sup>2</sup> *Hampden v. Walsh* (1876), 1 Q.B.D. 189-196.

the Gaming Act, 1845: 'No action shall be brought to recover any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made'.

This interpretation is based upon an assumption that the Section was meant to apply *only to the non-recovery by the winner of a sum deposited by the other party* to abide the event, and not to the right of depositor to recover back his *own* deposit, if demanded before the money was paid over.

The policy of this Act is in any case different from that of the Betting Act, 1853, which provides that money received by *the owner of a betting-house*, as a deposit or consideration for a bet, may be recovered in any court of competent jurisdiction. And this provision is not impliedly repealed by the later Gaming Acts,<sup>1</sup> so that the position is that the stake can be recovered from such a person, but not the winnings.

The same principle was applied in the Missing Word Competition mentioned previously<sup>2</sup> where the payments in one competition had amounted to no less than £23,000 and 1,358 competitors had guessed the right word. Before the prizes could be paid the competition was alleged to be illegal and the money paid into court. Mr. Justice Stirling held that the whole venture was a lottery, that the Court could not aid in distributing the fund, but that each contributor might recover his shilling from the promoter, to whom the entire sum was repaid in order that he might meet any legal claims.

#### OFFICE USED FOR BETTING

Returning now to racing competitions, it will be seen that the question is by no means concluded by the decision in which it was held that a coupon competition for selecting winning horses was not a lottery.<sup>3</sup>

Nemesis was on the track of the defendant in the last case and five years later he was again prosecuted. This time it was not for promoting a lottery, but for unlawfully keeping an office 'for purpose of money being received, as the consideration for undertaking to pay money on horse-races'. A conviction was secured.<sup>4</sup>

#### BETTING HOUSES ABROAD

The practice of evading the betting laws by having offices on the Continent is well known, but the following case illustrates the danger of half-measures.

A football newspaper was published in London, and in this publication was advertised a football coupon competition promoted in an office at Middelburg in Holland. Specially high rates were charged

<sup>1</sup> *Davis v. Stoddart*, [1902] 18 T.L.R. 260.

<sup>2</sup> *Barclay v. Pearson*, [1893] 2 Ch. 154.

<sup>3</sup> *Stoddart v. Sagar*, [1895] 2 Q.B. 474. See page 144, *ante*.

<sup>4</sup> *R. v. Stoddart*, [1901] 1 K.B. 177.

for these advertisements, but apart from this the newspaper proprietor had no connection with or interest in the competition.

The coupons, when cut out and filled in, were sent with the money direct to Middelburg, but the name of the newspaper was used in the address.

The offence, it will be remembered, consists in keeping a house (the London newspaper office) for the purpose of receiving money for betting. A conviction against the proprietor was recorded, and upon appeal it was held in the High Court that there was evidence on which the magistrate could properly find that the office was used as an 'essential part of the machinery' for receiving money for an illegal purpose and the conviction was right.<sup>1</sup>

It appears that where the offence consists (as here) of 'illegal user' of a place, the person using must have a closer connection with the newspaper than other advertisers would have.

#### ADVERTISING BETTING HOUSES

In reference to the advertisements prohibited by the amending Betting Act of 1874, it has been held that in order to bring an advertisement within the Act it must appear by reasonable inference from the advertisement itself that it refers to betting under conditions such as are prohibited by the principal Act of 1853. This Act, it must be remembered, refers to 'keeping a place' for betting purposes.

The case making clear the law on this point was one of many fought at different times by Mr. J. Hawke on behalf of the Anti-Gambling League. The advertisement on which action was taken read as follows: 'T. and S., Flushing, Holland. The Derby, Ascot Stakes, Royal Hunt Cup, Northumberland Plate, &c. The Continental Sportsman, also Year Book and Ready Reckoner. Free on receipt of address. Telegraphic instructions can be sent to London. All letters to be addressed T. and S., Flushing, Holland'.

The publishers were charged with causing advertisements to be published whereby it was made to appear that an office and place were used by T. & S. for the purpose of making bets, in a manner prohibited by the Betting Act, 1853, and evidence was given as to bets taken subsequent to the advertisement.

A conviction having been obtained, it was held on appeal that such evidence was irrelevant; further that it did not appear from the advertisement that betting was carried on *at any place* in England or Ireland and that this is the form of betting prohibited by the principal Act. The conviction therefore could not stand.<sup>2</sup>

A similar point was made in another case which dealt with advertisements and offers of racing tips. Here again the conviction was quashed,

<sup>1</sup> *Mackenzie v. Hawke*, [1902] 2 K.B. 216.

<sup>2</sup> *Ashley & Smith v. Hawke*, [1903] 89 L.T. 538.

and the learned judge pointed out that the legislation was intended to strike at a real mischief, and to suppress betting houses. To enlarge the scope of the section in the way in which he was being asked to do, was to put an unreasonable construction upon the Act.<sup>1</sup>

The general effect of the cases is that the sending or publishing of any letter or advertisement inciting persons to bet is an offence. It is not necessary that the person sending the letter should be the person making the bets or profiting by them.<sup>2</sup>

#### FOOTBALL BETTING ACT, 1920

The Ready Money Football Betting Act, 1920, provides a penalty of £25 or one month's imprisonment for printing, publishing or knowingly circulating any advertisement, circular or coupon of any ready-money football betting business, whether in the United Kingdom or elsewhere. (Subsequent offences £100 or three months.)

Two important cases were decided on this Act in the course of 1925. The first was on a point analogous to that in the 'disc' and 'spot' advertising schemes.<sup>3</sup> A sixpenny weekly magazine containing football and racing news held coupon competitions during the winter offering £150 for ten correct forecasts of results of football matches, and £100 for nine. It appeared that the winter circulation was 32,000, falling to 8,000 in the summer, and that the vast majority of the purchasers bought the paper for the coupon. The proprietors were convicted of publishing coupons of a ready-money football betting business, contrary to the 1920 Act.<sup>4</sup>

This case is entirely in accord with the racing-coupon cases of forty-five years ago. It was then said that these competitions were a form of betting, although they were not lotteries, but no offence is made out until it is shown that an office or 'place' within the meaning of the Act is kept for betting purposes.<sup>5</sup> This difficulty is, of course, removed under the Ready Money Football Betting Act.

#### GUILTY KNOWLEDGE

In the second important case interpreting this Act a printer was summoned for having unlawfully printed coupons of a ready-money football betting business. The words 'to be used for credit only' were printed on the coupons, and the person who had ordered them did, in fact, conduct a credit-betting business.

Some of the coupons were, however, found to be used for ready-money betting in the streets, but there was no evidence to connect this with the person who had ordered the coupons.

<sup>1</sup> *Cox v. Andrews* (1883), 12 Q.B.D. 126.

<sup>2</sup> *Agnew v. Morley*, [1909] S.C.J. 41.

<sup>3</sup> See page 137, ante.

<sup>4</sup> *Suttle v. Cresswell*, [1926] 1 K.B. 264.

<sup>5</sup> *R. v. Stoddart*, [1901] 1 K.B. 177.

A conviction was obtained, and an appeal to the High Court followed. It was clear from the judgment of the Lord Chief Justice that he regarded the words 'to be used for credit only' as a sham, and that in any case the Act only requires *guilty knowledge* in respect of 'circulating', and not in respect of 'printing and publishing'. In the latter case the printer or publisher is presumed to know the purpose for which the coupons will be used. The appeal was dismissed.<sup>1</sup>

In a 1926 case, coupons printed in Fleet Street were distributed in Monmouthshire. The printer was charged with illegal publication, but on appeal it was held that there was no evidence to connect him with the distribution. If the charge had been of printing rather than publishing, it would have succeeded.<sup>2</sup>

In the case of *Sir W. C. Leng & Co. (Sheffield Telegraph) v. Shillitoe*, [1929] 1 K.B. 366, it was again decided that 'football competitions' constituted an offence against the Ready Money Football Betting Act, 1920.

The Court followed the cases of *Suttle v. Cresswell*, [1926] 1 K.B. 264, and *Turf Publishers v. Davies*, [1927] W.N. 190. The Lord Chief Justice (Lord Hewart) said that it was not a material element that the great majority of the buyers of the newspaper should buy for the sake of the coupon. What was necessary was that there should be materials which indicated that there was a ready-money football betting business within the definition in Section 2 of the Act. It might be that the facts also showed that the appellants had committed an offence under the law relating to lotteries, but that did not arise at the moment.

### MONEYLENDERS' CIRCULARS

BETTING AND LOANS (INFANTS) ACT, 1892

The subject of moneylenders' circulars, which is next to be considered, has at least one point of contact with the betting advertisement question, namely, that this statute makes it illegal to send either to persons under twenty-one.

The material words are: 'If any person for the purpose of earning profit sends or causes to be sent to a person whom he knows to be an infant, any circular, notice, advertisement, letter, telegram or other document which invites or may reasonably be implied to invite the person receiving it:

- to borrow money, or to make any bet or wager,
- or to enter into any transaction involving the borrowing of money, or betting or wagering,
- or to apply to any person at any place with a view to obtaining information or advice for similar purposes;

he shall be liable upon indictment to three months' imprisonment and £100 fine; or on summary conviction to one month and £20.'

<sup>1</sup> *White v. Robertson*, [1925] 41 T.L.R. 484.

<sup>2</sup> *Police v. Heath*, [1926] 23rd October, *Evening News*.



The person 'from whom information may be obtained' is presumed to have sent the circulars unless he proves the contrary. If a betting circular is sent to any person at a '*place of education*', it will be presumed that the sender knows that such person is an infant unless he shows reasonable grounds for believing otherwise.<sup>1</sup> In respect of money-lending circulars, this presumption obtains at all times *and in all places*, until reasonable grounds for holding the contrary belief are adduced.

#### MONEYLENDERS ACT, 1927

This Act provides the same penalties as in the 1892 Act for the following offences:

'Knowingly sending or delivering moneylenders' advertisements or circulars to any person except in response to a written request.

'Inserting or causing to be inserted moneylenders' advertisements in newspapers or periodicals, except such as contain only the name and the place as licensed, a statement that money is lent with or without security, and the date on which the business was first established.'

Transactions brought about by contraventions of these provisions are declared to be void. Every advertisement and other document issued is to show *conspicuously* the licensed name, and also, except in the case of an advertisement published in a newspaper, any assumed name used for registration under the Moneylenders Act, 1900. Fine for each offence £20.

#### INTERPRETATION OF 'CIRCULAR'

The following case shows that the word 'circulars' is liable to receive a wide interpretation:

Here a tipster sent out ten duplicated copies of a letter to ten clients who each owed him the sum of five shillings and tenpence for tips for horse races, asking for payment and referring to his business generally by promising 'some more winners at long odds'. These documents were held on appeal to constitute advertising circulars.<sup>2</sup>

<sup>1</sup> *Milton v. Studd*, [1910] 2 K.B. 118.

<sup>2</sup> *Cashmore v. Smith*, [1919] 83 J.P. 157.

## CHAPTER TWENTY-FOUR

### ILLEGAL PUBLICATIONS AND PRINTS (*Contd.*)

#### III. OTHER ILLEGALITIES

##### SUNDAY OBSERVANCE ACT, 1781

ONE of the old Sunday observance statutes, honoured to-day in the breach perhaps, rather than in the observance, has a section relating to printers and publishers.

'For the better preventing persons assembling on the Lord's day for irreligious purposes, be it enacted that any person advertising or causing to be advertised any public entertainment or amusement, or any public meeting for debating on any subject whatsoever, on the Lord's day, to which persons are to be admitted by the payment of money, or by tickets sold for money, and any person printing or publishing any such advertisement, shall respectively forfeit the sum of £50 for every such offence, *to any person who will sue for the same.*'

The Crown has power to remit the penalty whenever this course is expedient, under an amending Act of 1875.

##### CONTEMPT OF COURT

This subject which was touched upon in its relation to the law of libel must now be considered more generally.<sup>1</sup> The serious consideration, especially in criminal trials, is whether the course of justice may be perverted, owing to the publication complained of.

For example, in one case a reporter sent to his editor articles reflecting upon the character and conduct of an accused person, this being matter which in any case would have been inadmissible in evidence against him. The editor published the articles, and the accused person was convicted and sentenced. The editor and the reporter were themselves afterwards charged and convicted 'for conspiring and attempting to pervert the course of justice', by publishing the article in question.<sup>2</sup>

Where items of news which are in contempt are distributed by a news agency, the manager is liable<sup>3</sup> and ignorance of the contents of a publication on the part of the printer or publisher is no defence, though it 'goes in mitigation'.<sup>4</sup>

In many of these cases, the proceedings are taken by one party to an action against the other, where the latter has made premature publications with the object of securing some special advantage.

<sup>1</sup> See page 83, *ante*.

<sup>2</sup> *R. v. Tibbitts & Windust*, [1902] 1 K.B. 77.

<sup>3</sup> *Re Robbins of the Press Association*, [1891] 7 T.L.R. 411.

<sup>4</sup> *Ex parte Jones* (1806), 13 Ves. 237.

## PUBLISHERS AND CONTEMPT

The leading case on the point concerns an infringement of a patent for nickel-plating in 1881.<sup>1</sup> An injunction had been obtained restraining the defendants from further infringements, and they gave notice of appeal.

They then published an advertisement in the *Birmingham Daily Post*, asking the nickel-plating trade to subscribe the necessary funds to prosecute the appeal. It was pointed out that unless the verdict was reversed no firm could continue nickel-plating by any process whatever except the plaintiffs and their licensees. In a separate advertisement £100 reward was offered to anyone producing documentary evidence that nickel-plating was done previous to 1869.

The plaintiffs moved to commit the printers and publishers of the newspaper to prison for contempt of court, but they stated that they did not press for this course, and would be satisfied with an apology and an undertaking not to repeat the advertisement.

The Master of the Rolls (Jessel, M.R.) in a very able judgment, enunciated several important principles of law. He said: 'In order to commit *the printers and publishers* for contempt the plaintiffs must show that the advertisements themselves were *on their face* such that a person of ordinary intelligence conducting a newspaper must have known that the publication of them was an interference with the course of justice.'

He held that the advertisement itself was open to no objection as it was directed to persons having a common interest with the defendants, in resisting the claims of the plaintiffs; and that the allegation that the offer of £100 might induce people to forge documents was simply wild.

'I must add,' continued the learned Master of the Rolls, 'that the practice of making these motions against innocent people like the editors or publishers of newspapers ought to be discouraged; they lead to great waste of time and to a considerable amount of costs.'

Newspaper proprietors will doubtless regret that this suggestion has not been acted upon more widely.

## OFFICIAL SECRETS ACTS, 1911 AND 1920

These statutes have been applied on several occasions for the purpose of preventing persons who have held or are holding official positions from providing newspapers with sensational copy in respect of matter which has come to their knowledge in the course of carrying out their duties.

It has been held that in spite of the title of these Acts, their operation is by no means restricted to the disclosure of *secret* information; and it is certainly in the public interest that something should be done to

<sup>1</sup> *Plating Co. v. Farquharson* (1881), 17 Ch.D. 49.

counterbalance the temptation to accept the very large sums that newspapers are willing to pay to obtain exclusive matter of this kind.

The prosecution in 1926 of an ex-governor of a London prison who had disclosed the supposed confession of a murderer before his execution will be remembered in this connection.<sup>1</sup>

#### FALSE RUMOURS

Knowingly to spread or to conspire to spread any false news or rumours with intent to enhance or decry the price of goods, or the price of stocks is a misdemeanour.<sup>2</sup>

#### STOLEN GOODS

It is a misdemeanour at common law to 'compound a felony'. Thus a promise not to prosecute a thief in consideration of his returning the property is a crime; and similarly an advertisement to recover 'lost property' with the words 'no questions will be asked', constitutes the offence.

#### LIABILITY OF ADVERTISER AND PUBLISHER

The liability in respect of publications which are prohibited by statute, such as lottery advertisements, is incurred by all concerned; and no printer or publisher can be heard to say that he did not know the law was being broken. In cases of 'contempt', however, as has been seen, the responsibility of the publisher depends entirely upon whether the matter is obviously and necessarily unlawful. If it is clearly in contempt, then no indemnity offered by the advertiser can be enforced, a vital consideration which must never be lost sight of.<sup>3</sup>

#### CONTRACTS FOR ILLEGAL ADVERTISEMENTS AND DAMAGES FOR NON-INSERTION

It has already been pointed out that such agreements are unenforceable,<sup>4</sup> and if carried out by the publisher, he cannot sue successfully for the price. In other cases where a publisher omits to insert an ordinary advertisement by an oversight, after accepting the order, the amount of damages recoverable is by no means limited to the fee for insertion, but may include any fair computation of the loss of trade.<sup>5</sup>

#### CROWN PREROGATIVE

The exclusive right of the Crown to print the Bible, the Book of Common Prayer, and Acts of Parliament has been mentioned in

<sup>1</sup> *Director of Public Prosecutions v. Blake*, [1926] 16th December, *Times* newspaper.

<sup>2</sup> 7 & 8 Vic. c. 24, s. 4; 55 & 56 Vic. c. 19 (repealed); 52 & 53 Vic. c. 63 (offences preserved).

<sup>3</sup> *Smith v. Clinton*, [1908] 25 T.L.R. 34.

<sup>4</sup> *Smith's Advertising Agency v. Leeds Laboratory Co.*, [1910] 26 T.L.R. 335; and see pages 130 and 135, *ante*.

<sup>5</sup> *Marcus v. Myers & Davis*, [1895] 11 T.L.R. 327.

connection with the subject of copyright. It remains only to be added that by the Evidence Act, 1845, where any person prints any copy of any private Act or of the journals of either House of Parliament, which falsely purports to have been printed by the printer to the Crown, or to either House of Parliament, he is guilty of a felony. Similarly, it is a felony to tender such documents in evidence knowing them to be forged. The maximum penalty fixed by the statute is seven years' transportation, for which penal servitude is now substituted.

The service of H.M.'s Stationery Office is so excellent to-day, and its publications are so inexpensive, that there is little temptation to commit this particular crime, save with the object of producing a false version. The same, however, may not always be true of statutes, orders and regulations issued by the Legislatures of some of the smaller British possessions; it is therefore well to remember that the Evidence (Colonial Statutes) Act, 1907, provides twelve months' imprisonment as the penalty for printing a copy, or pretended copy of any such Act, &c., which falsely purports to have been printed by the Government printer, or tendering such in evidence.

Using the Royal Arms without His Majesty's authority in connection with any business or calling is an offence under the Patents and Designs Act, 1907, and punishable with a fine of £20. Lists of authorised persons are occasionally published in the *London Gazette*.

There are other statutory prohibitions against the wrongful use of titles and devices, calculated to lead to the belief that a person is employed by, or supplies goods to a member of the Royal Family;<sup>1</sup> also against the registration of marks containing representations of the Royal Arms or colourable imitations thereof, or the word 'Royal' or anything calculated to give the impression falsely that the applicant has Royal patronage.<sup>2</sup>

<sup>1</sup> Patents and Designs Act, 1907, Section 90.

<sup>2</sup> Trade Marks Rules, 1906, Rule 12.

## CHAPTER TWENTY-FIVE

### HIRE-PURCHASE TRANSACTIONS

*(The Bills of Sale Acts)*

**THE** increasing favour shown year by year by almost every section of the public to this form of trading renders it essential that everyone who may be concerned in hire-purchase transactions shall have at the very least some grasp of their essential features as contemplated by the law.

Three points must be dealt with:

- (1) Validity in respect of the Bills of Sale Acts.
- (2) Title in the goods hired.
- (3) Assignability of interest.

#### **BILLS OF SALE**

A bill of sale at Common Law is a grant of the general property in personal chattels unaccompanied by a transfer of possession, and is thus the form of mortgage which applies to goods.

In order to check the abuses which existed formerly when ignorant people gave bills of sale without properly understanding what they were doing, and when dishonest people gave bills of sale and afterwards disposed of their goods a second time, the Bills of Sale Acts were passed.

These Acts required the documents to be in a set form so that they could not be misunderstood, and made it a condition that they should be clearly explained by the solicitor acting in the transaction. Also in order to check fraud, the Acts required bills of sale to be publicly registered so that any intending purchaser of the goods could safeguard himself by taking the necessary trouble.

#### **INFRINGEMENTS OF BILLS OF SALE ACTS**

A hire agreement is not infrequently bad because it infringes the Bills of Sales Acts. Such an infringement will usually be found to lie, *not* in a defect in the agreement, but in the circumstances surrounding the whole transaction.

If *any* hire-purchase agreement is really a cloak or device for *securing a loan*, and if the 'owner' or 'bailor' is in fact not an owner, but merely a person who is finding the money the 'hirer' needs, and has never 'owned' the goods in any ordinary sense, then the agreement amounts to a bill of sale, and is void for non-conformity with the schedule form required by the Bills of Sale Act of 1882.

The vital thing to remember is that where the mischief arises in this form it cannot be cured merely by altering the wording of the agreement.

#### TWO EXAMPLES

The following cases show what can and what cannot be done. In the first example to be considered,<sup>1</sup> an owner of furniture required a loan of £150, and made a fictitious sale of the goods, handing over one chair as a token. He immediately took his goods back on a hire-purchase agreement, undertaking to pay rent with the usual conditions, the furniture to be his again when £200 had been paid. The borrower became a bankrupt, and the whole transaction was held to be void as against the Official Receiver, the lender having no remedy since his agreement was an unenforceable bill of sale.

In another case<sup>2</sup> the safety line had not been passed. Here a lessee in arrears for rent *sold* his furniture to his landlord for £1,500. The landlord now *leased* back the furniture to the lessee for six months, with an option to repurchase for £1,500. The sale and the lease were distinct transactions, the consideration paid was adequate, and a cheque was paid to the landlord, and endorsed by him as received in payment of arrears of rent.

The Borough Council then distrained for rates, and the landlord sued for a declaration that the furniture belonged to him. It was held that he was entitled to succeed. The property in the goods had passed to him, and the transaction was not a *mortgage*, but a bona fide sale, followed by a good agreement to hire.

#### SCHEMES TO FINANCE HIRE TRADING

In one specific case,<sup>3</sup> a firm of traders in motor-cars obtained two chassis from the manufacturers and sent them to a coach builder to have bodies built for them.

The price of the chassis had, however, been provided not by the traders but by another party altogether, a company formed for the purpose of financing the sale of motors, and this company had purported to resell to the real purchasers – the traders – on a hire agreement.

The traders became bankrupt and their liquidators claimed the property in the cars against the financing company.

Lord Atkinson described the transaction as a scheme designed to conceal the real nature of the dealings. It was an attempt on the part of the finance company to secure their funds without the publicity of

<sup>1</sup> *Re Watson, ex parte Official Receiver* (1890), 25 Q.B.D. 27.

<sup>2</sup> *Prudential Mortgage Insurance Co. v. Marylebone Borough Council*, [1910] 8 L.G.R. 901.

<sup>3</sup> *Motor Trader Finance Ltd. v. H. E. Motors*, [1926] H.L., 26th March, *Financial Times*, 27th March.

a bill of sale, and yet to retain an absolute power of seizure over goods which were in fact the property of the purchasers. The hire agreement was therefore held to be void and unenforceable.

It is a question of fact for the Court in each case whether the transaction is a bona fide purchase and reletting or is a loan on the security of a hire-purchase agreement.<sup>1</sup> The mere fact that a finance company's object is to lend money does not necessarily make the transaction a money-lending one that would be unenforceable because the company was not a registered money lender and had not complied with the provisions of the Moneylenders Acts, 1900 and 1927.

In certain schemes of this kind additional security has been sought by getting the hire instalments *guaranteed*. It cannot be too carefully borne in mind that whether the guarantor is a private individual, or whether as in large-scale operations he is an insurance company, any person becoming a surety for the performance of an agreement which is in fact void, is automatically discharged of his obligations in law.<sup>2</sup> Whether he cares to recognise a moral obligation is, of course, another matter.

#### FUTURE PAYMENT WITH LIEN OR CHARGE

Somewhat different relations arise where the real intention is a *sale*, and the ownership of goods is intended to pass, subject to a lien or charge to secure payment at a future time. Such an arrangement, if under a hire agreement, may become ineffective under the Factors Act and the Sale of Goods Act which will be dealt with under the heading of 'Title'.<sup>3</sup> It may, however, also be impeached as contravening the Bills of Sale Acts.

In one case<sup>4</sup> of this kind there was an agreement for the sale of a business, the price of which was to be paid at a future time. As the purchaser was to continue the business, selling the stock in trade, it was clear that the ownership had passed to him. The vendors were to have a lien or charge for the purchase-money and interest upon the property sold. This agreement was very properly construed as a bill of sale, and not being registered was declared void.

The exact application of these principles varies with every case, and all that has been attempted is to point out a few pitfalls.

<sup>1</sup> *Automobile & General Finance Corporation v. Morris*, [1929] 73 Sol. Jo. 451; *Olds Discount Co. Ltd. v. Cohen*, [1938] 3 All E.R. 281; *Olds Discount Co. Ltd. v. Playfair Ltd.*, [1938] 3 All E.R. 275.

<sup>2</sup> Incidentally, note that a guarantee is bad if signed at a date later than that of the principal contract. The reason is that the consideration (i.e. the acceptance as a debtor of a man of slender resources) has already passed. See page 176, 'Subsequent Statements'.

<sup>3</sup> See page 159, *post*, *Coburn v. Collins* (1887), 35 Gh.D. 373.



**A PROBLEM**

Here, for example, is a hypothetical set of circumstances to which the reader may fit the law for himself.

A newspaper proprietor and printer is enlarging his business generally and wishes to purchase a linotype machine. Wishing to get a close quotation, and in fact believing that he will be able to find the cash, he makes no mention of deferred payments.

His credit is perhaps a little better than his balance warrants, the deal is made, and he takes delivery and *thus becomes the owner in fact*. He now finds that immediate payment is not as convenient as he had supposed, and a hire agreement is suggested.

In the course of a couple of years he becomes bankrupt, and his trustee in bankruptcy claims the linotype machine for the benefit of the creditors. The manufacturer, however, endeavours to maintain that the machine is his property under the hire agreement, and sues for its return. Will he succeed?

## CHAPTER TWENTY-SIX

### HIRE-PURCHASE TRANSACTIONS (*contd.*)

#### TITLE IN GOODS HIRED

##### TITLE

LEAVING now the question of invalidity under the Bills of Sale Acts, the second point for consideration is whether the hire agreement is so worded that the title to the property remains vested in the 'owner' in spite of wrongful dealing on the part of the 'hirer'.

In any case, sales in 'market overt' cannot commonly be impeached, nor yet can sales under a voidable title, nor sales by 'mercantile agents', since the Factors Act, 1889<sup>1</sup> specifically protects and validates sales of other people's goods by such agents, if carried out in the course of their trading, and if they have been placed in possession of the goods with the consent of the true owner. This is, of course, intended to promote confidence in ordinary trading transactions, as opposed to sales by private individuals.

##### AGREEMENTS TO BUY

The statutory provisions which must be guarded against refer to '*agreements to buy*' and are to be found both in the Factors Act and in the Sale of Goods Act.<sup>2</sup> The principle of these provisions is that where a person has *agreed to buy* goods and obtains possession of them with the consent of the seller, if he then transfers the goods to any third person receiving the same in good faith and without notice of the rights of the original seller, such a transfer shall have the same effect *as if the person making the transfer were a mercantile agent*.

If, then, the hire agreement would be judicially construed as an '*agreement to buy*', the owner's title is at once in jeopardy, and here is the main danger to be guarded against.

Having regard to the nature of the transaction, which is in essence payment by instalments of a *purchase price*, it is clearly necessary to provide in a very special manner that the agreement shall be kept outside these statutory provisions.

The very frequently quoted case of *Lee v. Butler*<sup>3</sup> illustrates the position. Here the hirer undertook to pay all the fixed sums, and on completion of the payments the goods were to become his property. During the currency of the agreement he sold the goods, and the

<sup>1</sup> Section 2 (1).

<sup>2</sup> Factors Act, 1889, Section 9; Sale of Goods Act, 1893, Section 25 (2). See pages 42 and 290.

<sup>3</sup> *Lee v. Butler*, [1893] 2 Q.B. 318.

action was brought by the 'owner' to recover possession. It was held that, as the hirer had *no option to terminate* the hiring by returning the goods, the transaction was in fact an 'agreement to buy', and the owner could not recover the goods from a purchaser who had bona fide bought them from the hirer.

In *Helby v. Matthews*,<sup>1</sup> on the other hand, a piano was bought on a hire agreement which made *special provision for the return* of the article at any time, and this was to bring the agreement to an end. The hirer, getting into financial difficulties, parted with the piano and pawned it. The claim for the piano was fought to a finish in the House of Lords, it being ultimately decided that this agreement was *not* a 'contract to buy', and did not pass a good title to the pawnbroker.

#### PURCHASE BY NOMINAL PAYMENT

In many cases, however, a trader who is anxious only to effect sales does not approve of a clause which thus opens the door at any time to a termination of the transaction. In order to meet this view an alternative method had been devised, which does away with the clear option of return.

This principle, which was tested in *Leman v. Yorkshire Railway Waggon Co.*,<sup>2</sup> was based on a number of compulsory hire payments. The completion of these, and the satisfactory carrying out of all undertakings on the part of the hirer, were made conditions precedent to a purchase which he was now to be free to make by a final nominal payment of five shillings. Seeing that there is no option to return the goods and determine the hiring, and that the option to buy for five shillings only arises when all the instalments have been met, this scheme can only be described as 'sailing very close to the wind'.

It is clear, however, that such an agreement is not an absolute 'contract to buy' within the meaning of *Lee v. Butler*; but it necessarily loses the advantages of the *Helby v. Matthews* method, which with its 'option to return' the goods, is looked upon as fair and equitable in the Courts. The vital point is, that in some way the transaction must *not* be an 'agreement to sell', but a hiring with an 'option of purchase'.

#### ASSIGNABILITY OF INTEREST

The proper desire of the Courts to do justice to all parties, in addition to administering the strict law, has led to a further development, which was worked out in a 1914 motor case.<sup>3</sup> The hirer had obtained possession of a taxi-cab under a hire agreement. He was required, as is usual, not to part with the goods, and in the event of his attempting so to do the owner was to be free to resume possession and to terminate

<sup>1</sup> *Helby v. Matthews*, [1895] A.C. 471.

<sup>2</sup> *Leman v. Yorkshire Railway Waggon Co.* (1881), 50 L.J. Ch. 293.

<sup>3</sup> *Belsize Motor Co. v. Cox*, [1914] 1 K.B. 244.

the hiring. By a further clause, if at any time the hirer wished to complete his purchase at once, he was to be at liberty to do so, on paying the balance outstanding. The hirer subsequently did part with the taxi-cab, when only a comparatively small sum remained to be paid.

The question of title being tested, it was held that the hirer had *not* 'agreed to buy' but had only an 'option to buy'. So far so good, and the new possessor did not obtain a good title, as in *Lee v. Butler*. But inasmuch as the hirer was held to have assigned his valuable 'option to buy' to the new possessor, the latter was entitled to retain the goods on payment of the outstanding balance to the owner. It is possible that the result might have been different if the agreement had provided, not that the owner *should be free* to resume possession, but that the agreement should *automatically* come to an end, if the hirer parted with the goods.

#### THE REDEMPTION CLAUSE

In many agreements there is a 'redemption clause' providing that in the event of the owner resuming possession under his powers, the hirer in turn shall be entitled on payment of arrears and charges to redeem the goods and complete the instalments.

This right has been held to constitute a special 'assignable interest', enabling a bona fide purchaser from the hirer to retain the goods on payment of the sums outstanding to complete the hire rent and purchase. The point was decided in 1918 and it may be of interest to detail the facts and the issues raised.

The well-known firm of Whiteley's Ltd. were plaintiffs in this important case,<sup>1</sup> and the dispute centred round a piano which was a part of the furnishing of a flat which the hirer had disposed of to a new tenant for £100.

There was an express clause that *until payment of the last instalment* the hirer was to remain a bailee only (the 'option to buy'). Also by a further provision, in the event of seizure by the owners under their rights, the hirer was to be entitled to resume possession and continue the hiring on payment of all arrears and expenses (the 'redemption clause').

Following the unauthorised sale to the new tenant of the flat, the owners claimed to seize the piano, and refused to accept payment of the outstanding balance from the new possessor.

The money was paid into Court, and the question threshed out.

The hirer had two special interests in the piano apart from the ordinary right to retain possession as long as the instalments were paid. One was the 'option to purchase' after paying the instalments provided, and the other under the 'redemption clause'.

<sup>1</sup> *Whiteley v. Hilt*, [1918] 2 K.B. 808.

Lord Swinfen Eady (Master of the Rolls) said that although a bailment may be determined by doing any act entirely inconsistent with terms of the bailment, yet it by no means followed that if the bailee has further interests in the chattel of a proprietary kind, he necessarily forfeited those interests by dealings with the chattel not warranted by the terms of the bailment. Failing express agreement to the contrary, the Court would regard those interests as assignable, and would not allow the plaintiff to recover more than the unpaid instalments.

If, therefore, as usually is the case, the personal references of the hirer are of great importance to the owner, and indiscriminate assignment by the hirer would be most prejudicial, the agreement must prohibit such assignment in the clearest terms, and, further, it should provide that on any attempt to assign, the hiring shall automatically come to an end, and the option to purchase shall be no longer exercisable.

#### MACHINERY

Special provisions may be found in agreements for the hire purchase of machinery. Such agreements may contain a 'license to use under patents belonging to the owner', in addition to the ordinary hiring. A further provision is sometimes inserted, giving an indemnity by the owner to the hirer in respect of actions which may be brought against the latter for infringements of letters patent belonging to other persons.

In the absence of any knowledge by the parties to the contract that there was reasonable ground to suspect a possible infringement, such an indemnity is possibly enforceable; but it must always be kept in mind that undertakings to keep a person harmless from the consequences of a breach of the law are, to say the least, doubtful security.

#### CONVERSION

Amongst actionable wrongs connected with hiring agreements none is more common than that of 'conversion', and it may not be out of place to make a few observations thereon.

Conversion arises from an unauthorised act which deprives the true owner of his goods either permanently or for an indefinite time. The gist of the action lies in the unauthorised dealing, and there must be an intent to interfere not merely with possession, but with the title or ownership of the goods.

Where the defendant has acted with full knowledge of the owner's rights he may be prosecuted criminally for fraudulent conversion in addition to being sued in the civil Courts, but even where he has acted innocently he may be liable for damages up to the full value of the goods.

In a leading case on innocent conversion<sup>1</sup> a lady residing at Bourne-mouth assigned her furniture to the plaintiffs by a bill of sale. Subse-

<sup>1</sup> *Consolidated Co. v. Curtis & Son*, [1892] 1 Q.B. 495.

quently she instructed the defendants, a firm of auctioneers, to sell the furniture on her behalf at her residence. They had no knowledge whatever of the bill of sale, or of any defect in their client's title to the goods. Accordingly they sold them as instructed, and in due course delivered them to the purchasers. The plaintiffs sued the auctioneers for conversion. On these facts the auctioneers were found guilty of conversion and judgment was given against them.

It should be added that an auctioneer can always claim to be indemnified by his principal in such a case; but where the principal himself is insolvent already, this is not of great value. When the full value has been recovered in satisfaction of judgment, the property in the goods converted vests in the defendant.

#### DETINUE

Where the defendant is actually in possession of the goods, the plaintiff can sue in an action of 'detinue' against anyone who unlawfully *detains* his property, and the Court will usually order the return of the chattels; but there is a power to award damages instead, in certain very limited cases.<sup>1</sup>

In a 1926 case on detinue,<sup>2</sup> an auctioneer had sold a valuable set of old Hepplewhite chairs at a very low price, and then refused to deliver them. It was found on the evidence that there had been a 'knock-out' or ring of trade buyers who had previously agreed not to compete with each other.

The chairs happened to be the auctioneer's own property and he was naturally aggrieved. The learned judge (McCardie, J.) found that the 'knock-out' system, however scandalous, was not actually unlawful;<sup>3</sup> he was, however, able to give some effect to his views, by refusing to order the auctioneer to deliver up the goods, and limiting the damages to £15, this being the sum which the plaintiff in his evidence had stated to be the loss he had sustained.

The same case illustrated a technical point on the 'memorandum in writing' which it will be remembered must exist as evidence of the sale of goods of £10 or upwards, where there is no acceptance or part payment in lieu of such written evidence.

The auctioneer had simply entered the plaintiff's name and the price in his book opposite the lot sold. The Act<sup>4</sup>, however, requires the 'memorandum' to be *signed* by the party to be charged or his agent, and in this case the auctioneer relied on the fact that he had not affixed his own signature, and claimed in consequence that there was no memorandum to satisfy the statute. His lordship, however,

<sup>1</sup> Sale of Goods Act, 1893, Section 52, see page 295.

<sup>2</sup> *Cohen v. Roche*, [1927] 1 K.B. 169.

<sup>3</sup> 'Knock-outs' have since been made unlawful by the Auctions (Bidding Agreements) Act, 1928.

<sup>4</sup> Sale of Goods Act, 1893, Section 4; see pages 32 and 285.

decided that his name printed on the catalogue, being acknowledged as it was by the auctioneer's further acts, was sufficient signature to satisfy the section; and it need hardly be added that any different decision would invalidate a large proportion of sales by auction throughout the country.

#### HIRE PURCHASE ACT, 1938

Certain hire agreements involving the payment of only small sums are subject to control by the Hire Purchase Act, 1938. In the case of printing machinery or equipment the Act would apply to cases under which the hire-purchase price or total purchase price, as the case might be, did not exceed £100.

In such cases there must be, otherwise than in the note or memorandum of the agreement for hire purchase, a disclosure of the price at which the goods may be purchased by the hirer for cash, and there must be a notice in the note or memorandum as to the right of the hirer to terminate the agreement.

## CHAPTER TWENTY-SEVEN

### HIRE-PURCHASE TRANSACTIONS (*contd.*)

#### THIRD PARTY CLAIMS

##### DISTRESS FOR RENT

WHERE a person who has goods on hire purchase is in arrears with his rent, the landlord can claim the goods before the owner.

Similarly, a prior claim may be made in respect of certain taxes, but this right is very limited and is dealt with below.

The relevant statutory provisions are found in the Law of Distress Amendment Act, 1908. The first section provides that if a landlord levies a distress on any goods belonging to a person who is not a tenant of the premises, for arrears of rent, such person may serve the landlord with a declaration that the tenant has no right of property in the goods distrained. If the landlord proceeds in spite of such declaration, he is to be deemed guilty of an illegal distress. This protection extends to lodgers and under-tenants, subject to special conditions.

Section 4 goes on as follows:

‘(1) *This Act shall not apply to goods belonging to the husband or wife of the tenant.*

‘(2) *Nor to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant.*

‘(3) *Nor to goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof.*’

It will thus be seen that where the tenant is a married man, his wife’s property is not protected. But if a piano is found on the premises which is the subject of a hire-purchase agreement in the wife’s name, this cannot be seized,<sup>1</sup> for it is not

(1) The wife’s property, nor

(2) Comprised in a hire-purchase agreement made by *the tenant*, nor

(3) In the husband’s reputed possession, by the consent of the owner.

As to any claim by the landlord under (3), the onus is on him to prove the true owner’s consent to the tenant’s possession.

##### CUSTOM TO HAVE GOODS ON HIRE, OR ON SALE OR RETURN

It is an answer to claims under the ‘reputed ownership’ clause (3) that there is a well-known custom in any particular trade for a person

<sup>1</sup> *Shenstone v. Freeman*, [1910] 2 K.B. 84.



to have possession of the goods of others, and this will be dealt with more fully under the heading of 'bankruptcy'.

Such a custom has been proved in respect of the hiring of printers' machinery, household furniture and other goods, including sewing machines and pianos. There is clear authority for saying that the law takes note of changing customs.<sup>1</sup>

As regards goods comprised in *hire-purchase* agreements, if it can be shown that the hiring had been *automatically ended* at the time of the distress, thus taking the goods out of exception (2), as may be the case by the terms of the agreement, the plea of this custom may be of great importance in order to save them from exception (3). But it is not sufficient to provide in the hire-purchase agreement that the owner's consent to the hirer's possession of the goods shall automatically determine if any landlord of the hirer threatens or takes any step to levy a distress for rent on the goods. The owner must take some overt step to determine his consent. If he does not do so, the goods remain in the reputed ownership of the hirer (tenant) and are distrainable.<sup>2</sup>

#### DISTRESS FOR TAXES

This is authorised by the Income Tax Act of 1918 (the important Consolidating Act now in force), and as regards hired property the provision upon which the right is based is this:<sup>3</sup>

'If a person neglects or refuses to pay the sum charged, the collector shall distrain upon the premises *in respect of which* the tax is charged, or distrain the person charged by his goods, and all such other goods as the collector is hereby authorised to distrain.'

It will therefore be seen that there is no authority to distrain by goods other than the defaulting taxpayer's, except for taxes charged in respect of the premises in which the goods are found. Thus hired goods may be distrained for property tax, but never for income-tax, except the amount based on the annual value of the premises.

In regard to rates, whilst there is no general statutory right of distress, yet many local authorities, including gas and water companies, have taken power under private Acts of Parliament to recover rates and other charges 'by the same means as landlords are entitled to recover rent in arrear', and in these cases goods under hire agreements may be distrained for rates, where they could not be touched for income-tax.

#### BANKRUPTCY

Another important statutory provision in relation to goods held on

<sup>1</sup> *Bell v. Hamilton* (1854), 10 Ex. 545.

<sup>2</sup> *Times Furnishing Co. Ltd. v. Hutchings*, [1938] 1 All E.R. 422.

<sup>3</sup> Income Tax Act, 1918, Sections 162 and 163.

hire purchase is contained in the Bankruptcy Act, 1914,<sup>1</sup> which provides that:

'The property of the bankrupt divisible amongst his creditors shall comprise all goods being at the commencement of the bankruptcy in the possession order or disposition of the bankrupt *in his trade or business* by the consent and permission of the true owner under such circumstances that he is the *reputed owner* thereof.'

It will be noticed that the words 'in his trade or business' do not figure in the 'reputed ownership' clause of the Law of Distress Amendment Act. Thus household furniture, for example, in a bankrupt's reputed ownership, though held on hire purchase, cannot be seized by the trustee in bankruptcy, if the agreement is correctly drafted.

As regards reputed ownership of goods in a man's trade or business, it is not an uncommon practice for the true owner to have a plate affixed on the property (e.g. a linotype machine) setting out his ownership. It has been held that such an indication is not conclusive evidence,<sup>2</sup> although it is some evidence of the fact alleged. The true owner can, of course, prove in the bankruptcy for the value of his debt.<sup>3</sup>

It is of importance to remember that the bankruptcy rules as to reputed ownership are not imported into the winding-up of companies.<sup>4</sup>

#### CUSTOM TO HAVE GOODS ON SALE OR RETURN

Goods on 'sale or return' are normally held to be within the 'reputed ownership' clause, and thus are liable to be sold for the benefit of the creditors, if they are in the bankrupt's possession in his trade or business; whilst even *personal* property held in this way may be distrained for *rent*.

But here again an established custom in a trade for a trader to have possession of the goods of others, whether on sale or return, or hire, or hire purchase, negatives this reputation. The custom must have been proved in any trade where it is invoked, or if not yet proved, evidence must be forthcoming to satisfy the Court. It has been proved in regard to hotel-keepers hiring furniture,<sup>5</sup> also for booksellers<sup>6</sup> and certain other trades, as to their stocks.

As to the printing trade, a custom has been proved to let printing machinery on hire, so as to exclude the doctrine of 'reputed ownership'

<sup>1</sup> Bankruptcy Act, 1914, Section 38.

<sup>2</sup> *Watson v. Peache* (1834), 1 Bing N.C. 327.

<sup>3</sup> *Re Button, ex parte Haviside*, [1907] 1 K.B. 397.

<sup>4</sup> *Gorringe v. Irwell India Rubber & Gutta Percha Works* (1886), 34 Ch.D. 128.

<sup>5</sup> *Crauxcour v. Saller* (1881), 18 Ch.D. 30.

<sup>6</sup> *Whitfield v. Brand* (1847), 16 M. & W. 282.

in the event of the bankruptcy of the hirer, but this custom does not extend to the hiring of type.<sup>1</sup>

#### HIRE PURCHASE ACT, 1938

This Act, referred to in the previous chapter, extends, as regards hire-purchase agreements coming within its restricted scope, the protection against distress given by the 1908 Act.

<sup>1</sup> *Re Thackrah, ex parte Hughes & Kimber* (1888), 5 Morr. 235.

## CHAPTER TWENTY-EIGHT

### MISTAKE AND INNOCENT MISREPRESENTATION

THE subject of printers' contracts cannot be left without a general explanation of the law concerning mistake and fraud. It is not possible, of course, to give more than the barest possible sketch under these heads with the hope that it may help a business man in difficulties to place his problem in the right category, and to understand it from the technical standpoint.

In the first place, the effects of *mistake* on a contract must be considered; next will be taken *representations* which *induce* a contract (such as the reasons why a printer is selling his business); then we must examine the *terms of the contract* itself (such as a publisher's statement as to the circulation of a newspaper which he is selling).

#### MISTAKE

Considering then first of all those matters which are no part of the contract itself, it must be observed that if it was induced by mistake of certain kinds the contract is *completely void*.

For example, if a cargo is sold 'ex. S.S. *Peerless*' and there are two vessels of the same name, and the buyer is thinking of one, and the seller of the other, this is a mistake rendering the contract void.<sup>1</sup>

The result is the same where the subject of the contract is non-existent;<sup>2</sup> or, as was pointed out in a previous chapter, where there is a mistake about the identity of the other party, as where an order is sent with a forged signature.<sup>3</sup> Here the trader intends to contract with the named person, and has no one else in his mind. But a distinction has been drawn in cases where a man *presents himself* giving a false name, e.g. at a jeweller's shop. Here the tradesman can make no mistake as to *the person* with whom he was dealing; he is merely deceived as to his name,<sup>4</sup> and fraudulent misrepresentation (which is not *mistake* in law) does not render a contract void from the very outset – but merely *voidable* as and when the fraud is discovered.

#### VOID AND VOIDABLE CONTRACTS

One important result of the distinction is this: if goods which were obtained as the result of a contract which is *void* from the outset, pass into the hands of a third party, he can have no title to them since the 'middle-man' can give no better title than he himself had.

<sup>1</sup> *Raffles v. Wichelhaus* (1864), 2 H. & C. 906.

<sup>2</sup> Sale of Goods Act, Section 6.

<sup>3</sup> *Cundy v. Lindsay* (1878), 3 A.C. 459; see page 41.

<sup>4</sup> *Phillips v. Brooks*, [1919] 2 K.B. 243.

But if the contract was only *voidable*, and the goods passed into other hands *before* the defrauded seller had exercised his right of rescinding the bargain, then the second buyer's title is good.

If, however, the goods were obtained not merely by a fraudulent misrepresentation or under false pretences but by 'larceny by a trick', no title passes to the thief, nor can he give a title to the 'receiver'.<sup>1</sup>

#### DOCUMENT SIGNED UNDER MISTAKE

Where a document is signed under a mistake *as to its nature* a supposed contract may be void in law. But this rule applies exclusively to *fundamental* mistakes, as where a guarantee is put forward as a conveyance, or where a grantor is told that he is signing as a witness.

'When a man knows he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, or has such confidence in his solicitor as to execute the deed in ignorance, then in my opinion a deed so executed, though it may be voidable on the ground of fraud, is not a void deed.'<sup>2</sup>

#### MISTAKE AS TO TERMS

Another important branch of the subject deals with mistake as to one of the terms of the contract. This, however, will only operate to make void the contract where the *mistake was known to the other party*, so that there was never a real agreement.

A case which is often quoted in illustration of this principle deals with a sale of oats to a trainer of race-horses.<sup>3</sup> It appears that trainers always use old oats for the purpose, whereas these oats were new.

The facts were that the plaintiff, a farmer, having good new oats asked the trainer if he wanted to buy oats, and, on being answered by the trainer that he was always ready to buy good oats, gave him a sample and told him the price. The trainer took away the sample and next day bought the bulk, but afterwards refused to accept them because they were new, *whereas he had thought to buy old*.

If the farmer had *said* the oats were old, this misstatement would have sufficed as a ground for setting aside the contract. Short of that nothing else would suffice, unless the farmer, *knowing that the trainer believed the oats were old*, allowed him to buy them whilst under this mistake; and this, of course, is most difficult to prove.

But if the *trainer* merely makes a mistake as to the oats he is buying, this is no ground for rescission; nor yet is it a ground that the trainer thought the farmer was selling old oats. The essential point is that knowledge

<sup>1</sup> Except in a sale in 'market overt', see Appendix, page 290.

<sup>2</sup> *Hunter v. Walters* (1871), 7 Ch. App. 75.

<sup>3</sup> *Smith v. Hughes* (1871), L.R. 6 Q.B. 597.

of the trainer's mistake must be brought home to the farmer; in other words, there must be an element of dishonesty in the transaction.

#### MISREPRESENTATION AND DAMAGES

A representation is a statement inducing a contract, but not necessarily forming any part of its terms.

The general rule is that damages cannot be claimed for *innocent misrepresentation*, except where there is a special duty to disclose (as between intending partners), or where there is a fiduciary relationship.<sup>1</sup>

Such a representation may subsequently be incorporated into the contract, and then if untrue it will give rise to a claim in damages. If the untrue representation is *not* incorporated into the contract, damages can only be claimed if it was made *fraudulently*.

#### INNOCENT MISREPRESENTATION AND RESCISSION

The consequences of an innocent misrepresentation are not easily remedied. If discovered in time the other party may refuse to complete his bargain, but once the contract is definitely carried out on the faith of the innocent misstatement, then it can only be rescinded in cases where the statement goes to the very root and substance of the matter, so that to all intents and purposes there is a failure of consideration.<sup>2</sup>

For example, a shipping company which had important Government contracts for carrying inter-colonial mails published a prospectus for a new issue of shares. The capital was required to enable the company 'to perform the contract recently entered into with the Government of New Zealand for a monthly mail service with Panama'.

The plaintiff applied for an allotment, and obtained some of the new shares. The contract alluded to in the prospectus was, however, never satisfied by the New Zealand Government, having in fact been entered into by an unauthorised agent.

The plaintiff claimed to rescind his contract; he was not allowed to do so, on the ground that the innocent misrepresentation did not affect the substance of the matter, he having got shares in the very company for which he had applied, which shares were of considerable value.<sup>3</sup>

In cases where relief could be obtained it is essential that there should be no delay or apparent acquiescence, and also that it shall be possible for the parties to be put back into the former position. If, for instance, in the last example the shares in the company had changed hands, this would in any case have been impossible.

<sup>1</sup> *Nocton v. Ashburton*, [1914] A.C. 932.

<sup>2</sup> Exceptions are provided by cases under the Companies Acts, 1929 (Sections 35 and 37) and 1947 (Section 108), and by cases of breach of warranty of authority.

<sup>3</sup> *Kennedy v. Panama Mail Co.* (1867), L.R. 2 Q.B. 580.

Where, however, there was a substantial misstatement, though not made fraudulently, which induced a plaintiff to enter into a contract, the contract was set aside. This established the equitable rule that 'a material representation, though not fraudulent, may give a right to avoid or rescind a contract where capable of such rescission', and the rule was confirmed in 1934 as applying to all contracts.<sup>1</sup>

<sup>1</sup> *Derry v. Peck* (1889), 14 App. Cas. 347, confirmed by *Mackenzie v. Royal Bank of Canada*, [1934] A.C. at page 475.

## CHAPTER TWENTY-NINE

### FRAUDULENT MISREPRESENTATION

MISSTATEMENTS of this nature will always suffice as a ground for claiming damages, and where the claim is made in time for obtaining rescission, subject to the following rules.

#### NOT OMISSIONS

There must be *a statement and not an omission*, unless there is a partial statement which makes the omission positively misleading. The ordinary rule is '*caveat emptor*', 'let the buyer beware'.

Thus a farmer, in contravention of a penal statute, sent his pigs to market when he knew they were infected with typhoid. The plaintiff bought them 'with all faults' and the greater number died. Not unnaturally, he claimed that there was an implied representation that the pigs were free from any contagious disease. The case went to the House of Lords, where it was held that in ordinary circumstances such a representation could by no means be implied, and the buyer was left without a remedy.<sup>1</sup>

In particular cases such as insurance contracts, or where there is a special duty to disclose, as between partners, any material omission may vitiate the agreement, and it makes little difference in these cases whether the omission was innocent or fraudulent.

#### KNOWLEDGE OF FALSEHOOD

To constitute fraud the misstatement must be made *with knowledge that it is false*; or without belief in its truth; or *recklessly* without caring whether it be true or false.

Carelessness is never enough, though where carelessness is coupled with a special duty to take care, this will constitute negligence.

The above definition was arrived at in the leading House of Lords decision on fraudulent misrepresentation. Here the directors of a tramway undertaking invited a subscription of capital, and in the prospectus stated *that they were entitled* to use steam power as the means of locomotion. In point of fact, the special consent of the Board of Trade was required, but the company believed this to be unnecessary as their *plans* had already been passed by that department. The consent was refused and the company had to be wound up. A shareholder then sued the directors in respect of the false statement.<sup>2</sup>

<sup>1</sup> *Ward v. Hobbs* (1877), 4 A.C. 26.

<sup>2</sup> *Derry v. Peek*, page 172, *ante*, and equitable rule there referred to.



The judgment of the supreme tribunal made it very clear that there must always be an element of criminality to constitute fraud.

'In my opinion,' said Lord Herschell, 'making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds.

'At the same time I can conceive many cases, where the fact that an alleged belief was destitute of all reasonable foundation, would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one.'

#### NOT OPINION

The matter complained of must be a statement of fact and *not an expression of opinion*. But a man may deliberately misstate his own thoughts; as Lord Justice Bowen said in an oft-quoted dictum, 'The state of a man's mind is as much a fact as the state of his digestion.'<sup>1</sup>

#### NOT LAW

It must be a statement of *fact and not of law*.

For instance, where one party explains the rights to be acquired by the other party under a contract, he is merely stating a legal result, and it is presumed that the other party is just as capable of understanding the position.

Here again if one party is in a fiduciary capacity towards the other, or 'owes him a duty to disclose', the general rule will not apply. Furthermore, in many cases the statement may consist partly of fact and partly of law, and if it is dishonest it may then well amount to a fraudulent misrepresentation.

#### INTENTION

The misstatement must have been made with the intention that *the plaintiff* should act upon it.

Thus in one case false statements were contained in a prospectus, and the shares allotted to an original subscriber were then sold by him to someone else. The person who bought the shares suffered serious loss and sued the directors for the fraudulent statement. It was held that the prospectus was addressed to the *subscribers* only, and not to subsequent buyers, and thus there was never any intention that *the plaintiff* should act upon it.<sup>2</sup>

Yet if the prospectus was merely part of a fraudulent scheme of untrue statements made to create and maintain a market for the shares, the Court would hold that the subsequent damage was contemplated throughout by the promoters, and they would be held liable.<sup>3</sup>

<sup>1</sup> *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459.

<sup>2</sup> *Peek v. Gurney* (1873), L.R. 6 H.L. 377.

The same principle applied where a farmer bought a gun warranted 'safe and secure and made by Nock', for his own use and for his son.<sup>1</sup> The gun was not 'made by Nock', and on being fired, it exploded, injuring *the son* who now sued the seller for his false representation. The defence was set up that as no statement, true or otherwise, had been made *to the son*, no action would lie; but it was held that as the seller contemplated the son's use of the faulty gun, so the seller must be responsible for the results.

#### RESULT

The misrepresentation *must in fact have deceived* the plaintiff.

Thus in another case a cannon was offered for sale. The seller had plugged a hole in it and painted it over. The buyer made no examination but bought the cannon, and on firing, it exploded.

He refused to pay for the gun and was sued, but ultimately lost the day. Said Baron Bramwell, 'If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him.'<sup>2</sup>

These decisions only go to the point of *fraud*. Where a dealer sells goods *which are dangerous by their nature* there is the ordinary warranty implied under the Sale of Goods Act, Section 14, on which *the buyer* may base his action for damages; while there is in addition a common law liability in tort *to third parties* into whose hands the goods may come, for negligence, unless they were sold with a special warning as to their dangerous nature.

#### CONDITIONS AND WARRANTIES

Leaving now the examination of the representations which induced the contract and preceded it, we must classify briefly the statements *which are terms of the contract* and form part of it.

Clearly, many a statement may belong to both categories, as for example the description of the faulty gun 'secure and made by Nock' in the case given above. This statement induced the contract and was then incorporated into it as one of its terms.<sup>3</sup> On the other hand, in a contract for the sale of goods, a statement as to the financial position of one of the parties would not ordinarily be more than a mere representation inducing the contract.

The law divides the terms of a contract into two classes, 'conditions' and 'warranties'.

The difference between a condition and a warranty is that the former goes to the root of the whole transaction, whilst the latter is merely *an undertaking collateral to the main purpose* of the contract.

<sup>1</sup> *Langridge v. Levy* (1837), 2 M. & W. 519.

<sup>2</sup> *Horsfall v. Thomas* (1862), H. & C. 90.

<sup>3</sup> *Langridge v. Levy* (1837), 2 M. & W. 519.

If a 'condition' is broken, the other party can rescind the contract, instead of, or as well as, claiming damages; if a 'warranty' is broken, he can only claim damages, but must go through with the bargain and take the goods.

When faulty goods are *accepted* by the buyer this is equal to a waiver of any broken condition, and thereafter he must regard the term as a warranty. He cannot now reject after having once accepted, but may still sue for the damages incurred.<sup>1</sup>

#### A LEADING CASE

A man who was buying hops inquired whether the ground had been treated with sulphur. If this had been done, he said he was in no way interested, and would not even inquire the price.

The seller gave a satisfactory answer, and the sale took place. It was subsequently discovered that out of an estate of 300 acres the crop of which was sold, sulphur had been used on five acres for an experimental purpose.

Normally an undertaking of the kind given would have been no more than a warranty, making the seller liable for whatever damages were incurred. In this case, however, the undertaking was a preliminary stipulation, and a *condition* upon which the parties contracted. It was thus an essential part of the contract, the breach of which discharged the buyer from any obligation to take the goods.<sup>2</sup>

#### SUBSEQUENT STATEMENTS

A warranty made *subsequently to the contract* can never ground an action, since there is no consideration to support it.

Thus where a person bought a horse at a certain price, and *afterwards* the seller promised that the horse was free from vice, it was held the undertaking was not implied in the original contract, but was entirely gratuitous and thus could not be sued upon.<sup>3</sup>

#### COMMERCIAL WARRANTY

The word 'warranty' is usually used in commerce as a *guarantee* that an article shall answer a particular standard of quality. Such a promise is, in law, a *condition* the breach of which would entitle the buyer to reject the goods at any time until the sale is executed; but once it is executed and the goods have been delivered and accepted with knowledge of the defect, the promise can only be regarded as a true warranty in law the breach of which is a ground for an action for damages.

<sup>1</sup> See pages 47 and 286.

<sup>2</sup> *Bannerman v. White* (1861), 31 L.J. (C.P.) 28.

<sup>3</sup> *Roscorla v. Thomas* (1842), 3 Q.B. 234.

## CHAPTER THIRTY

### NUISANCE

#### GENERAL PRINCIPLES

TRADES which involve the use of heavy machinery are somewhat liable to lead to a breach of the law in the matter of nuisance; it is therefore only natural to find that from time to time printers are in difficulties with their neighbours on this score.

#### PUBLIC NUISANCE

In considering the law of nuisance for this purpose it will suffice if we confine ourselves to a comparatively small area, disregarding, for example, the branch of 'public nuisances', as exemplified by nuisances on highways. In the latter case the remedy will be by criminal proceedings, or by a civil action commenced by way of information, the suit being in the name of the Attorney-General.

Similarly, the common law remedy of 'abatement', where persons aggrieved may be justified in taking the law in their own hands and 'abating' the nuisance, applies in the main to rights of ways and rights of common, and has no practical application to trouble caused by noisy machinery.

#### PRIVATE NUISANCE

Private nuisances of the kind contemplated here give rise to complaints which may be placed in either or both of the following classes; these are, first, such complaints as are founded upon the *annoyance* caused to other people, and secondly, such as result in *concrete damage* to neighbouring property.

#### ANNOYANCE

In the first place, the annoyance complained of must affect the plaintiff, 'in the enjoyment of his property'. Thus, if smoke from a factory chimney or the vibration of machines is only a nuisance to people in general, this is a public nuisance and the proper person to take action is the Attorney-General, on an information being laid by a member of the general public.

But if the owner of adjacent property suffers particular damage beyond the inconvenience inflicted upon other people, he may bring a private action; and of course he has the same remedy if he alone is annoyed and inconvenienced.

### CONTINUITY

A temporary inconvenience does not amount to a nuisance where such inconvenience is not unreasonable in extent, or prolonged for an unreasonable time.

In one case where a water company used unnecessarily noisy pumps in sinking a shaft,<sup>1</sup> it was held that the annoyance being temporary and for a lawful object did not amount to a nuisance at law.

### STATUTORY AUTHORITY

It was further held in that case that the authority conferred upon the water company to sink the shaft included all things *reasonably necessary* for the work. It was urged for the plaintiffs that the statute only authorised things *absolutely necessary* for the execution of the work, and as noisy lift-and-force pumps could be dispensed with, and ultimately were in fact replaced by centrifugal pumps, they never should have been used.

The Court thought otherwise, however, and ruled that all that was necessary was that the works should be done with as little damage and annoyance as might be reasonable. There was nothing unreasonable in the use of noisy lift pumps for the first few lengths of shafting.

### INJURY TO HEALTH

As the gist of the action lies in the annoyance and not in the damage, it is clear that the thing complained of need not be actually injurious to health; for example, in the case of objectionable smells it is sufficient if they are offensive to the senses.<sup>2</sup>

### NATURE OF NEIGHBOURHOOD

In considering this aspect of the subject, the distinction between the two kinds of private nuisance must be remembered, namely, between a nuisance producing material injury to property, and one merely producing personal discomfort. As to the latter, a person must submit to the discomforts of the place he chooses to live in and of the trades carried on around. As to the former, the same rule does not apply, and he can always claim a remedy for material damage.

In one case which is continually quoted,<sup>3</sup> a person had bought an estate near a number of factories, and he complained of the fumes from certain copper-smelting works. Apart from general annoyance he proved that those vapours had injured certain trees upon his estate.

### THE BALANCE OF PUBLIC INTEREST

The case went to the House of Lords and Lord Wensleydale summarised the position in a short judgment.

<sup>1</sup> *Harrison v. Southwark & Vauxhall Water Company*, [1891] 2 Ch. 409.

<sup>2</sup> *Rex v. Neil* (1826), 2 Car. & P. 485.

<sup>3</sup> *St. Helens Smelting Co. v. Tipping* (1865), 11 H.L. Cases 642.

'The defendants say, "If you do not mind you will stop the progress of works of this description." I agree that this is so, because no doubt in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say "I will bring an action against you for this and that and so on". Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected.'

#### DAMAGE MUST BE SUBSTANTIAL

The same points were reverted to in another leading case a few years later.<sup>1</sup>

In that case Lord Justice James said, 'If you are obliged to stand on scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purpose of establishing the damage itself, that evidence will not do. The damage must be such as can be shown by a plain witness to a plain common juryman.'

'A man to whom Providence has given an estate under which are veins of coal worth perhaps hundreds or thousands of pounds an acre, must take the gift with the consequence and concomitants of the mineral wealth in which he is a participator.'

These classic judgments have been quoted at some length because the principles embodied therein are frequently relied upon by defendants in actions for industrial nuisances, but not with unvarying success.

#### UNCERTAINTY OF THE TESTS

In practice, the great stumbling block is the uncertainty of any test which may be applied, the question being in the main purely one of fact.

In the words of Lord Halsbury, 'What may be called the uncertainty of the test, may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise, as if he lived in the country, and distant from other dwellings; and yet an excess of smoke, smell and noise may give a cause of action; but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action.'<sup>2</sup>

The following epigram from another judgment is a favourite one with advocates and neatly summarises the same point: 'What might

<sup>1</sup> *Salvin v. North Brancepeth Coal Co.* (1874), L.R. 9 Ch. 705.

<sup>2</sup> *Colls v. Home & Colonial Stores*, [1904] A.C. 185.

be a nuisance in Belgrave Square would not be a nuisance in Bermondsey.’<sup>1</sup>

#### LEGALITY OF TRADE IS NO DEFENCE

It is no answer in an action for nuisance that, apart from the annoyance, the trade is a lawful and proper one, although as has been pointed out above, it may be a complete answer that the work was being carried on under statutory authority, and in a manner that was reasonably necessary.

Thus, in the reign of James I it was said from the Bench: ‘The building of a lime-kiln is good and profitable, but if it be built so near a house that when it burns, the smoke thereof enters into the house, so that none can dwell there, an action lies.’<sup>2</sup>

#### COMING TO AN EXISTING NUISANCE

A difficult position arises where a noisy trade has been carried on for many years upon certain premises, and a house is then erected on adjacent land. It was formerly said that in these circumstances the plaintiff had ‘*come to the nuisance*’ and could not be heard to complain.

This is not the modern view, however, and the defendant may be liable in spite of a supposed ‘prescriptive right’ by twenty years user without interference or complaint. The reason is that *the annoyance* and the consequent right of action only *commenced* with the *erection* of the neighbouring house; the Court therefore refuses to recognise any prescriptive right, however long the trade had previously been carried on.

#### AN EXTREME EXAMPLE

In a leading case<sup>1</sup> the defendant was a confectioner in large business in Wigmore Street. The back yard of his house had been converted into a kitchen some sixty years previously, and both the defendant and his father before him had used in the kitchen two large marble mortars set in brickwork, worked by two large wooden pestles. The mortars were used for breaking up and pounding loaf sugar.

The plaintiff was a physician whose premises abutted upon the confectioner’s. He now proceeded to erect a consulting room in his back yard, and discovered that the noise and vibration of the pestles and mortars materially interfered with his practice.

The case turned entirely upon whether or no the claim of twenty years prescriptive user could bar the physician’s action.<sup>2</sup> The Master of the Rolls (Jessel, M.R.), dealt thus with the point:

<sup>1</sup> *Sturges v. Bridgman* (1879), 11 Ch.D. 852.

<sup>2</sup> *Aldred’s case* (1610), 9 Co. Rep. 59a.

<sup>3</sup> Prescription Act, 1832.

'Now the facts seem to be that until a very recent period this was not a nuisance at all. The actionable nuisance began when the plaintiff did what he had a right to do, namely, built a consulting room in his garden. When he attempted to use the consulting room for a proper purpose, he found the noise too great for anything like comfort. That was the time to bring an action for nuisance.'

#### THE ALTERNATIVE

Clearly this view is correct, since otherwise, if the physician had brought an action before he built his consulting room he might have been met with the answer that he was suffering no nuisance, and yet as soon as the room was built upon his own land he could be met by the defence of prescription; a result which would be absurd.



## CHAPTER THIRTY-ONE

### NUISANCE (*contd.*)

#### MACHINERY

##### THE LEADING CASE ON PRINTING MACHINERY

THE principles formulated in these cases were considered and applied some forty years ago in the leading case upon printing machinery as a nuisance.<sup>1</sup>

The premises in question were near Fleet Street in the very home of the printing industry. The plaintiff, a dairyman, had lived there for seventeen or eighteen years. On one side of his house printing machinery had been run for many years in the day-time, whilst the houses opposite included the works of the *Daily Telegraph* which were run regularly by night.

The defendants had taken the building on the other side of the plaintiff's house, where a printing business had previously been carried on. There they installed a cutter on the ground floor and a printing machine in the basement, and the complaint was in respect of the latter.

The machine was fixed on a concrete bed and driven by a motor throwing off 1,440 impressions per hour. It was carefully and properly worked, and certain alterations had been made in order to reduce the noise to a minimum. The disturbance at night was the principal cause of complaint, and the trial occupied some five days before Mr. Justice Warrington (as he then was).

##### THE CONTENTIONS OF THE PARTIES

The argument for the plaintiff was that *prescriptive right* by twenty years' uninterrupted user must be proved if serious inconvenience of this kind was to be justified, whatever the nature of the locality.

On the other hand the defendants replied that the locality had acquired its character before either party had come there. The plaintiff had come to the nuisance and could not be heard to complain of it.

##### THE DECISION

The trial judge granted the injunction asked for in respect of the night work only and the case went to appeal. The Lords Justices while refusing to disturb the judgment would not assent to the plaintiff's contention. In a manufacturing district such as this, they said, residents must be prepared to accept a lower standard of comfort irrespective of prescription.

<sup>1</sup> *Rushmer v. Polsue and Alfieri*, [1906] 1 Ch. 234; [1907] A.C. 121.

# SUBSTANTIAL ADDITION TO NUISANCE

The ground of their decision was put thus by Cozens-Hardy, L.J.: 'It does not follow that because I live in the manufacturing part of Sheffield, I cannot complain if a steam hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam hammer is of the most modern approved pattern and is reasonably worked. In short, if a *substantial addition* is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy and the machinery of a first-class character.'

Of the three affirming judgments in the Court of Appeal two proceeded upon the ground of the 'substantial addition' to an existing nuisance; while the third (Vaughan Williams, L.J.) held with some hesitation that the evidence might justify a finding that the noise complained of was *in excess of that* made by carrying on the trade in the manner established *in the district*, and that this was the real *ratio decidendi*, and not that of a 'substantial addition' to existing noises.

The case was carried to the House of Lords and was affirmed upon the ground of 'substantial addition', the above-quoted passage from the judgment of Cozens-Hardy, L.J., in particular being cited with approval.

## ANOTHER PRINTING CASE

The only other case in the Law Reports on printing machinery as a nuisance was decided in 1877.<sup>1</sup> On this occasion the scene of the difficulties was Paternoster Row, and the plaintiffs, a firm of solicitors, were the owners and occupiers of offices adjoining the defendants' steam-printing works. The factory had been in use from 1848 to 1875 without any complaint by the plaintiffs of nuisance occasioned by the noise and vibration of the machinery, though this was at all times noticeable.

## NEW MACHINE IN SAME WORKS

It appeared that the printing office contained light printing presses driven by a steam engine in the basement. In 1875 the defendants substituted a new Dryden machine for one of the older machines and from this date the plaintiffs complained of excessive noise and vibration.

The defence set up was that the additional inconvenience was trifling, and that the plaintiffs were showing a nervous sensitiveness which was quite unreasonable. Unfortunately for themselves, however, the defendants, in the hope of avoiding litigation, had reduced the

<sup>1</sup> *Heather v. Pardon* (1877), 37 L.T. 393.

revolutions of the new machine from 1,500 to 800 per hour. This was treated as a clear admission, and as corroboration of the plaintiffs' evidence of increased noise.

An injunction was granted, 'from working or using the engine and machines so as to occasion any greater amount of noise or vibration than had been experienced by the plaintiffs up to the end of the year 1875'.

As to such noise as existed before 1875, the defendants could show a complete prescriptive right irrespective of the doctrine in *Sturges v. Bridgman*,<sup>1</sup> because the owner of the adjacent building had submitted to the nuisance for the statutory twenty years.

#### MATERIAL DAMAGE

Considering now the point of material damage as opposed to annoyance, it has been pointed out that such damage must be appreciable and not something discoverable only by scientific tests.<sup>2</sup> Examples of such damage are where the brickwork develops cracks or a ceiling falls owing to the vibration in the adjoining building, and in these cases the cost of repairs is separately assessed, and claimed as *special damages*, apart from relief by way of *general damages* or an injunction.

#### GENERAL DAMAGES

This form of relief is not well adapted to ordinary cases of nuisance from machinery, the proper remedy being an injunction to prevent the continuance of the annoyance complained of. In special cases, no doubt, exemplary damages could and would properly be awarded, as where a man deliberately and defiantly flouts his neighbours' rights; but the Court will in general only give damages in lieu of an injunction if the injury is small, and a money payment adequate, and the circumstances are such that the granting of an injunction would be oppressive.

#### 'BLACKMAIL'

The jurisdiction to give damages in lieu of an injunction is of particular importance in the 'ancient lights' cases.<sup>3</sup> The owner of a house which had been erected for twenty years could formerly count on getting an injunction to prevent building upon a neighbouring site if the building would darken his windows. Once the injunction was granted the plaintiff could 'fix his own price' before the building could proceed.

It is now the law<sup>4</sup> that the Court can if it so wishes in every case

<sup>1</sup> See page 180, *ante*.

<sup>2</sup> *Salvin v. North Brancepeth Coal Co.* (1874), L.R. 9 Ch. 705; see page 179, *ante*.

<sup>3</sup> Lord Cairns Act, 18.

<sup>4</sup> *Leeds Industrial Co-operative Society v. Slack*, [1924] A.C. 851.

refuse the injunction and award damages instead, whether the nuisance exists or is merely threatened.

The choice of the remedy is purely a matter of discretion, and where the grievance is genuine and substantial the injunction will still be granted, especially if it is applied for in good time. Otherwise, if the defendant is allowed to spend considerable sums, to the knowledge of the plaintiff, and without any remonstrance, the Court will hesitate long before causing the defendant to incur a complete loss, by ordering him to demolish the new work.

#### ACQUIESCENCE

The granting of the equitable relief of an injunction is always discretionary, while the common law remedy of damages can be claimed as a right once the case is made out.

The result of this in machinery cases is that it is not always necessary to prove twenty years' prescriptive user to make out a good defence to an application for an injunction. Thus, where noise caused by machinery had been *acquiesced in* for five years only, the Court in its discretion refused to grant an injunction on the ground of increase of noise evidenced only by the sense of hearing. The defendants in that case were able to prove conclusively that no new machinery or change in the manner of working had been introduced.<sup>1</sup>

#### PRESCRIPTION

No prescriptive right can be set up where the 'twenty years' uninterrupted enjoyment' was the result of some *consent or agreement* expressly given for that purpose by deed or writing.

In other words, *the acquiescence relied upon must be passive*, and under such circumstances as that the plaintiff might at any time have asserted his rights, but did not do so.

<sup>1</sup> *Gaunt v. Fynney* (1872), 8 Ch. App. 8.

## CHAPTER THIRTY-TWO

### NUISANCE (*contd.*)

#### LANDLORD AND TENANT

##### THE RIGHT OF ACTION

IN actions for nuisance the question arises whether the landlord or the tenant of the adjacent premises should sue. The rule is that as regards interference with the enjoyment of property only the occupier can bring an action.<sup>1</sup>

The landlord, however, can sue in cases where the property will be permanently injured by the thing complained of. As a result in cases of heavy machinery the landlord of the adjacent premises will often be able to maintain an action, since a permanent depreciation is threatened.

Where, on the other hand, the noise or other inconvenience is not permanent the tenant alone will suffer, and he alone can claim protection.

##### THE DEFENDANT

Turning now to the case of the party at fault, e.g. the printer; the person primarily liable for the nuisance is the person who creates it, and thus in most cases the tenant will be the party attacked.<sup>2</sup>

The landlord can only be proceeded against where the nuisance arises from some definite act or omission on his part, as in the case of a landlord's breach of covenant to repair which affects adjacent premises.<sup>3</sup>

A landlord is under no duty to neighbouring owners to remove a nuisance upon his property if it has been placed there against his will or without his authority.<sup>4</sup>

##### LANDLORD AGAINST TENANT

The principles which have last been set out are those governing the positions of landlord and tenant in an action brought by a third party. We now proceed to consider the legal position as *between* landlord and tenant in the case of actual damage done to the freehold by the latter in the exercise of his trade.

Such damage in printing works will as a rule arise in one of two ways; either the floors may give way because they are not constructed to

<sup>1</sup> *Malone v. Laskey*, [1907] 1 K.B. 141.

<sup>2</sup> *Thompson v. Gibson* (1841), 7 M. & W. 456.

<sup>3</sup> *Todd v. Flight* (1860), 9 C.B. N.S. 377.

<sup>4</sup> *Saxby v. Manchester & Sheffield Railway Co.* (1869), L.R. 4 C.P. 198.

carry the weight of machinery and lithograph stones placed upon them, or the walls may develop cracks and shakes from the vibration of high-speed machinery.

The latter source of mischief is probably commoner than the former, but the governing principle is the same.

#### COVENANTS IN THE LEASE

The liability attaches differently according to the terms of the lease in each case; thus (1) the landlord may undertake to do repairs, or (2) the agreement may be silent on the point, or (3) the tenant may have expressly accepted the obligation.

Where the landlord has undertaken anything at all, he will as a rule either be responsible for repairs generally, or else restrict his obligations to a general covenant as to structure, walls, roof and main timbers.

The extent of the tenant's undertaking is far more variable, e.g. 'to uphold, repair and maintain the premises', 'to keep in good and tenantable repair', 'to leave the premises in good repair', and there may be an exception for 'fair and reasonable wear and tear'.

#### OLD BUILDINGS

Now as to any of these undertakings it should be noticed that they are satisfied by a general and substantial compliance. Difficulty often arises where the premises consist of old buildings. Here if the undertaking was merely 'to repair', the tenant is merely bound to keep them up as old buildings, and the landlord cannot claim to receive back anything better than he demised.<sup>1</sup>

But where a tenant agreed to *keep* a farm and outbuildings in good repair and at the expiration of the tenancy *to deliver them up in good repair* order and condition, it was held that on such a contract the tenant was bound to *put* the premises in good repair. He was not justified in keeping them in bad repair because he had found them in that condition, but the extent of his duty to repair was to be measured by the age and the class of the buildings.<sup>2</sup>

#### TENANTS' REPAIRS

A covenant to repair does not necessarily imply any liability for painting and papering as decorative work, but it does involve liability to carry out such painting as may be necessary to preserve the wood-work and ironwork.<sup>3</sup>

As to structural repairs it is obvious that if the tenant has undertaken any liability here, he is all the more liable if his machinery has

<sup>1</sup> *Gutteridge v. Munyard* (1834), 1 Mood. & R. 334.

<sup>2</sup> *Payne v. Haine* (1847), 16 M. & W. 541.

<sup>3</sup> *Crawford v. Newton* (1887), 36 W.R. 54 C.A.

contributed to the damage. If, however, he is protected by a clause excepting 'fair wear and tear', then if he used the premises in a reasonable and proper manner having regard to the use which both parties contemplated at the time of the agreement, the liability for structural damage caused by heavy loads of machinery may fall upon the landlord. Everything will depend upon whether the use was or was not reasonable in the special circumstances.<sup>1</sup>

#### NO PROVISION IN AGREEMENT

Where a lease is silent on the point of repairs no covenant is implied on the part of the landlord to do repairs of any kind.<sup>2</sup>

The tenant on the other hand is bound to use the premises 'in a tenant-like manner'. This obligation is hard to define with precision; it is generally said that there is no obligation to do general or substantial repairs,<sup>3</sup> but the tenant is bound to keep the premises 'wind and water tight'.<sup>4</sup>

#### SPECIAL DAMAGE BY USE FOR TRADE

Turning now to the specific cases upon injury to buildings by reason of their use for the purpose for which they were let, we find guidance in two clear and important cases which were decided many years ago.

One of these related to a newly-built grain warehouse; the landlord had undertaken to keep the main walls and main timbers of the warehouse in good repair and condition. The tenant commenced storing grain in what the Court decided was a reasonable and proper way. After a short time a beam supporting one of the floors gave way, and the external walls bulged outwards. The landlord executed the repairs and brought an action against the tenant to recover the money he had spent.

The Court held upon the facts that the tenant had not been guilty of any 'waste', and therefore that the landlord was bound to carry out the repairs under his covenant, at his own expense.<sup>5</sup>

#### UNREASONABLE USE

The principle in this case must be distinguished from that which would apply if the tenant had acted unreasonably, as in the familiar case in printing workshops, where lithograph stones are piled one upon another in a confined space until the floor gives way. Here the tenant is obviously answerable for a very serious act of waste.

<sup>1</sup> *Manchester Bonded Warehouse v. Carr* (1880), 5 C.P.D. 507.

<sup>2</sup> *Gott v. Gandy* (1853), 2 E. & B. 845.

<sup>3</sup> *Horsfall v. Mather* (1815), Holt N.P. 7.

<sup>4</sup> *Anworth v. Johnson* (1831), 5 C. & P. 239.

<sup>5</sup> *Saner v. Bilton* (1878), 7 Ch.D. 815.

## MUTUAL COVENANTS

The case last cited was considered and followed in an action which concerned the collapse of floors of a bonded warehouse in Manchester. The landlord had again covenanted to repair the walls and main timbers, and the tenant was to keep the inside of the premises in repair. There were provisions for the suspension of rent in the event of the premises being destroyed by fire, storm, tempest, or *inevitable accident*, and the lease also contained a clause providing that the tenant was not to underlet without the landlord's permission in writing.

The tenant sublet a part of the warehouse without permission, and the part sublet, being heavily loaded with stores, collapsed. The landlord carried out the rebuilding and then sued for the rent which had accrued due since the accident,<sup>1</sup> and for damages. The tenant counter-claimed for damages.

It was held that the collapse was not an 'inevitable accident' and the tenant was liable for the rent (as, failing a special clause in the lease, tenants commonly are after any fire or other disaster which necessitates rebuilding). It was further held that although both parties knew perfectly well the purpose for which the building was to be used, there was no *warranty* implied by law on the part of the landlord to the effect that the building was fit for the purpose for which it was used, on which he could be made liable for damages.

The learned judge further held that the landlord was not liable for damages upon the *covenant to repair*, because he had received no *notice* of any danger or want of repair before the building fell. This substantially disposed of the counter-claims by the tenant against the landlord.

Considering now the liability of the tenant, the Court held that the destruction of the property was not 'waste', since it was caused by using the building in what was apparently a reasonable and proper manner having regard to its character and the purposes for which it was intended to be used. Consequently the tenant was not liable in damages either; but under his *express covenant* to repair the interior he was bound to make good the cost of putting in the floors and fixtures.

The unauthorised underlease apparently made no difference, the landlord's only remedy in respect of this being to determine the head-lease. The fall of the building was not damage that could fairly be attributed to this breach of covenant, but was as likely to have occurred without it.

## GENERAL CONCLUSIONS

The general principle to be deduced from these cases is that where the tenant is under no express liability to repair, he cannot be made to pay the cost of special damage to the structure caused by his machines.

<sup>1</sup> *Manchester Bonded Warehouse Co. v. Carr* (1890), 5 C.P.D. 507.



The use of the machines must, however, be reasonable, and must have been contemplated at the time the lease was made.

On the other hand, if the walls or floors collapse without warning it is impossible to get damages from the landlord. In other words, and apart from special covenants, if the user is reasonable then the loss remains upon the shoulders of the party on which it has fallen.<sup>1</sup>

<sup>1</sup> *McLure v. Little* (1868), 19 L.T. 287.

## CHAPTER THIRTY-THREE

### PERSONAL INJURIES IN FACTORIES

#### LIABILITY OF FACTORY OCCUPIER

**THE** subject of a master printer's liability for accidents in his works is wide, and somewhat difficult to deal with, without a general exposition of the Law of Negligence.

The great majority of accidents occur, no doubt, to the servants of the printer, but some consideration of his liability in respect of other frequenters of the factory is also necessary.

#### COMMON LAW NEGLIGENCE AND STATUTORY COMPENSATION

Again in respect of servants the great majority of claims will be under the National Insurance (Industrial Injuries) Act, 1946, which came into force on 5th July, 1948. That Act, which superseded the Workmen's Compensation Acts, does not deal (as those Acts did not deal) with cases of injury where the employer has been at fault or in breach of the law. The Workmen's Compensation Acts left it open to an injured person to allege such fault or breach in the hope of getting more money as 'damages' than could be claimed as 'workmen's compensation' where there was no fault, and the 1946 Act, which now supersedes them, does the same.

#### 'INDUSTRIAL INJURIES'

The new Act is intended to improve the 'workmen's compensation' system by making compensation for industrial injuries a social service instead of being part of the system of employer's liability, and its administration will be carried out by the Ministry of Insurance and not the Ministry of Labour and National Service. It operates by means of a Central Fund made up of weekly contributions from employers and employees and a contribution from the Exchequer.

The persons who are insured under the 1946 Act include all those who are employed in Great Britain (not Northern Ireland) under a contract of service, irrespective of the amount of their earnings, and also persons serving under a contract of apprenticeship. The service contract need not be a written one. It may be merely implied from the circumstances of the employment.

The Act is expressly confined in its scope to accidents occurring and diseases developing after its commencement which, as stated above, was 5th July, 1948.

The principal Workmen's Compensation Acts are repealed by the new Act excepting certain sections, but they will continue to apply to

cases where the right to compensation arose in respect of employment before the new Act came into force.

Although the main 'compensation' Acts are repealed, a very large body of decisions by the Courts under these Acts will still have effect in so far as they relate to questions whether injuries have arisen 'out of and in the course of the employment', seeing that these limiting words are embodied in the new Act as a test of entitlement to benefit. In the first edition of this book the Authors gave a few pages of references to cases which showed the wide range of questions that had come before the Courts as to whether accidents had arisen 'out of and in course of the employment'. These are printed in Chapters Thirty-six and Thirty-seven as being still of value. But it should be noted that the new Act assumes in Section 7 (4) that an accident arising 'in the course of' has, in the absence of evidence to the contrary, also arisen 'out of' the employment.

#### ALTERNATIVE REMEDIES OF INJURED PERSON

There has for long years been the element of choice to be made by a worker as to whether he should accept what the Workmen's Compensation Acts provided or whether he should seek the alternative remedy open to him of damages at Common Law or under the Employers' Liability Act, 1880, if he could prove fault or negligence on the part of his employer. The new Act does not deal with cases of injury arising where it can be shown that the employer had been at fault or in breach of the law, and a departmental committee was set up to advise, in relation to the Government's social insurance policy, on the best course to adopt in regard to the rights which an injured workman might have under these alternative remedies.

The basis of the Workmen's Compensation Acts has been, and the basis of the Industrial Injuries Act is now, not the fault or negligence of the employer but the mere fact that the employed person has been injured by an accident 'arising out of and in course of the employment'.<sup>1</sup> If, on the other hand, he can prove Common Law liability by his employer he can claim reparation or restitution for the injury he has suffered, including in that injury any pain and suffering, disfigurement or loss of wages.

#### RECOMMENDATIONS BY DEPARTMENTAL COMMITTEE

The departmental committee issued its final report on this very difficult legal question of alternative remedies in July, 1946. This contained a summary of its recommendations, treating separately non-employment cases and employment cases. The former need not be referred to here, but the chief recommendations in regard to cases where the injured

<sup>1</sup> See Chapters 36 and 37 for cases interpreting this quoted phrase.

person is employed under a contract of service and the injury arises out of his employment may be stated as follows:

(1) The right of action by workmen against their employers for damages for personal injuries should be retained.

(2) Their right of action ought not to be limited to cases where the cause of the injury is the serious and wilful misconduct or gross negligence of the employer or of some person who has superintendence entrusted to him, whilst in the exercise of such superintendence.

(3) In the case of claims by workmen against their employers, or third parties, founded on breach of statutory duty, the defendant should not be liable in damages if he proves that it was not reasonably practicable for himself, or for his servants or agents, other than (i) the injured person or (ii) another servant or agent who committed the breach while outside the scope of his employment, to avoid or prevent the breach. In such a case, the defendant should not be relieved of his Common Law obligations apart from statutory duties.

(4) The doctrine of common employment should be abolished. Important reservations were stated by two members of the committee to certain of the recommendations.

#### GENERAL POSITION

It will be seen from what has been said on Common Law negligence and statutory compensation<sup>1</sup> and also on alternative remedies open to an injured worker, that on the subject of recompense for personal injury sustained by an employed person there has been substantial statutory change by the passing of the National Insurance (Industrial Injuries) Act, 1946. It will also have been noted that important changes were to be expected if the recommendations of the Departmental Committee on Alternative Remedies were embodied in legislation. One of those recommendations has been adopted by the passing of a very recent Act to the effect of repealing the Employers' Liability Act, 1880, and doing away with the doctrine of 'common employment' as a defence.<sup>2</sup>

Various defences which an employer may put forward in cases of claims against him for damages at Common Law or under the Employers' Liability Act, 1880, are referred to in the Final Report of the Departmental Committee. These defences are dealt with on the following pages, and the answer to the question whether some or all of them are to be still open to an employer will depend upon whether the recommendations of the Committee are eventually adopted in whole or in part in new legislation.

<sup>1</sup> Page 191.

<sup>2</sup> Law Reform (Personal Injuries), Act, 1948.

## DEFENCES AT COMMON LAW (GENERAL PRINCIPLES)

At Common Law it was a sufficient defence to the action for negligence that the injury was caused by a fellow servant, and that under the doctrine of 'common employment' the injured man was deemed to accept the risk of such negligence as incidental to his employment. That defence is no longer available,<sup>1</sup> but there are certain other defences to a Common Law claim. The injured servant may have voluntarily encountered the danger in the service of his master, and if he is injured in these circumstances the employer may rely upon the defence of *volenti non fit injuria*, or the 'assumption of risk', by the servant. The accident may have been partly caused by the contributory negligence of the person injured, or it may have been inevitable in the circumstances.

The distinction to bear in mind is that none of these Common Law defences are available if the claim is under the Industrial Injuries Act, the one criterion in that event being whether or not the injury 'arose out of and in the course of the employment' of the injured man.

## WHAT IS NEGLIGENCE?

The general rule was thus stated by Baron Alderson: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'.<sup>2</sup>

To this definition it must be added that the defendant must also be under a *duty* to take care. 'A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.'<sup>3</sup>

## THE DUTY TO TAKE CARE

The owner of a factory is under a duty to his servants to see that the premises in general and the machinery in particular shall be safe and that they shall be exposed to no unnecessary risk.<sup>4</sup>

He is under a similar duty to those who do business with him at his invitation, express or implied; and this means not only those who come to buy from him, but those who come to sell to him or to do particular work on his premises.

Again there is a duty to persons passing his premises, that they shall not be injured by any falling object, or by any defect of his property.

## NO DUTY TO A TRESPASSER

Here, however, the duty ceases, and the obligation is brought into relief when the position of a 'trespasser' is considered. A man trespasses

<sup>1</sup> See page 193.

<sup>2</sup> *Blyth v. Birmingham Waterworks Co.* (1856), 11 Ex. 78.

<sup>3</sup> *Le Lievre v. Gould*, [1893] 1 Q.B. 497.

<sup>4</sup> *Davidson v. Handley Page Ltd.*, [1945] 1 All E.R. 235; *Speed v. Thomas Swift & Co. Ltd.*, [1943] K.B. 557.

at his own risk, and if he is injured while he is in a place where he has no right to be, the law gives him no remedy.

Yet, although there is no duty towards a trespasser, the term itself is not as wide as at first appears. Thus if the proprietor or his manager knew that the injured man frequently passed through a part of the works where he had no strict right, the Court may well hold that he had received a tacit permission and was no longer a trespasser but a 'licensee' or one who enjoys a bare toleration; and the law says there is a duty towards a licensee to take care, though that duty is not so great as towards an 'invitee', or one who comes under an invitation to work or to do business.

In a leading case on the point, the owner of a field allowed people to cross it as a short cut, although there was no right of way. On one occasion a savage horse was turned loose in the field and a passer-by was injured. The owner was liable for the injury done to the passer-by as a licensee, though had the man been a mere trespasser he would not have been liable.<sup>1</sup>

#### WARNING NOTICES

An employer may post such notices in his works that an adult person disregarding them would be a trespasser; but the same rule would not necessarily apply to children, and if they were able to get into danger to his knowledge, an employer who took no further precaution might not be exonerated.<sup>2</sup>

#### TRAPS

Once it is established that the plaintiff was a trespasser in the place where he was injured, he can only recover damages in the exceptional case where he can prove that a 'trap' had been set for him. The principle is, that one must not *leave* a trap for a licensee, nor *set* one even for a trespasser.

#### RES IPSA LOQUITUR

The mere occurrence of an accident is not normally any evidence of negligence except in the cases where it is caused by something which is *under the immediate control* of the defendant or his servants. Thus where a barrel fell out of a window into the street, or a sack fell from a crane, the very incident 'spoke for itself' and the law implied negligence on the part of the person in charge.<sup>3</sup>

#### LIABILITY TO SERVANTS AT COMMON LAW

Every master is, as has been stated, under an obligation to take all

<sup>1</sup> *Lowery v. Walker*, [1911] A.C. 10.

<sup>2</sup> *Cooke v. Midland Great Western Railway Co. of Ireland*, [1909] A.C. 229; *Hardy v. Central London Railway Co.*, [1902] 3 K.B. 459.

<sup>3</sup> *Byrne v. Boadle* (1863), 2 H. & C. 722.

reasonable precautions to secure the safety of his workmen, and this extends particularly to the provision of safe and appropriate machinery, and to the selection of competent fellow servants.

If the master fails in these elementary responsibilities the law will impute negligence on his behalf, and though he may personally be ignorant of existing defects, this excuse will not avail him in cases where he ought to have known of them.

No doubt this entails wide liabilities, but at the same time it leaves many defences open to the master. These defences have been enumerated above, and will now be considered in detail.

#### PERSONAL MANAGEMENT BY THE MASTER

The master's liability at Common Law is entirely personal, and depends upon the extent to which he actually controls his own workshop. He is not and cannot be liable to his servant unless there is negligence on his part in that which he has impliedly contracted with the servant to do.

A master does not as a rule undertake with his servant to manage his works in person, but if he does not do so he is bound to select competent persons to superintend, and to furnish his servant with adequate appliances.

#### DELEGATION

When he has done this he has done all that he is bound to do, and if the persons selected for management are guilty of negligence, it is not the negligence of the master; or if he has delegated to a proper person the duty of seeing that the machinery is in proper order, and that person fails in his duty, no common law responsibility attaches to the master.<sup>1</sup>

The following case exemplifies the position perfectly. A master builder employed a bricklayer on a building job. Scaffolding was erected under the superintendence of the master's foreman, and was constructed by men in his employ who used an unsound ledger pole. In consequence the scaffold broke while the bricklayer was at work and he was killed. The unsoundness of the pole had been actually pointed out to the foreman, and an action was brought against the master. It was held that he was under no liability, there being no evidence *that the foreman was an improper person to employ for the purpose.*<sup>2</sup>

There is an exception to this rule in the case of the neglect of a *statutory duty* to take precautions. This is the master's personal responsibility, and he cannot rely on the defence of delegation. Where, for example, an accident arises from failure to fence dangerous machinery

<sup>1</sup> *Wilson v. Merry* (1868), L.R.I. (Sc. & Div.) 326.

<sup>2</sup> *Wigmore v. Jay* (1850), 5 Ex. 354.

under the Factories Act, delegation constitutes no defence to an action for damages.<sup>1</sup>

It must be remembered also that all this had no application in proceedings under the Workmen's Compensation Acts, nor has it any application under the Industrial Injuries Act; but it becomes of importance the moment the injured person or his dependants bring a Common Law action in order to secure damages against the employer on the ground of his fault or negligence.

<sup>1</sup> *Groves v. Wimborne*, [1898] 2 Q.B. 402 C.A.



## CHAPTER THIRTY-FOUR

### PERSONAL INJURIES IN FACTORIES (*contd.*)

#### EMPLOYERS' DEFENCES TO CLAIMS FOR DAMAGES

##### (1) COMMON EMPLOYMENT (Abolished 1948)

IN the immediately preceding chapter some reference was made to new legislation abolishing the doctrine of 'common employment' as a defence open to an employer. Since the passing of the Law Reform (Personal Injuries) Act, 1948, this section (1) will have little more than historic interest.

When a servant accepted a contract of service, he was taken by the law voluntarily to accept such perils as were necessarily and obviously incident to that service, among which was the danger arising from the negligence of a fellow workman, or even of the foreman or manager (but not of the master himself).

Consequently, at Common Law a master who had engaged servants of ordinary skill and care was under no liability for the consequences of an injury caused by the negligence of one servant and sustained by another; although he would be liable if anyone *not in his service* were injured by that act of negligence.

##### AN EXCEPTIONAL RULE

This rule, which was known as the doctrine of 'common employment', was a striking exception to the ordinary law by which every principal is responsible for the acts of his servant or agent acting within the scope of his authority, but the anomaly was to some extent remedied by the Employers' Liability Act, 1880.

Thus in the case of the negligent builder's foreman, the master was not negligent *as master* because he himself was not personally negligent in any way; nor could he be made liable *as principal* for the negligence of his agent because of this anomalous doctrine of 'common employment'. In other words, the plaintiff could not recover at all at Common Law unless he could bring home to the master either a failure to use reasonable care in the selection of his servants, or personal interference in the management.

##### DIFFERENT MASTERS

When the question of common employment arose in a Common Law case, further distinctions often appeared. For example, although the two men were working on the same job, they might actually have been working for different masters, independent contractors. In such a case

there was no common employment in law or in fact, and each master was fully answerable for injury caused by one servant to the other, if the former was acting within the scope of his employment.

#### VOLUNTEERS

Again, one of the two men might be a mere volunteer; if he chanced to be injured by the negligence of the other, he could not make the master of the other answerable, for he was in the position of a trespasser. But if the injured man, though not carrying out a prescribed duty, was working with the leave and to the knowledge of his master, he might claim the higher protection of a licensee, or even of an invitee, and recover all the damage he suffered.

The following case illustrates these principles.<sup>1</sup>

A master printer employed a linotype company to repair his linotype machine, and the company sent down a mechanic for the purpose. The plaintiff was one of the printer's workmen and the mechanic asked his assistance. During the repairs a chip of metal flew into the plaintiff's eye and injured him.

In an action brought by the plaintiff to recover damages from the linotype company for the injury, the jury found that the mechanic had been guilty of negligence in executing the work. They further found that the plaintiff was not a volunteer assisting the mechanic for the benefit of the linotype company, but that he assisted him for the benefit of his own master the printer, in order to expedite the work.

It was held that having regard to these findings of the jury, the doctrine of common employment was not applicable, and the plaintiff was entitled to recover.

#### EMPLOYERS' LIABILITY ACT, 1880, AND ITS REPEAL

The general effect of this measure was to modify but by no means to abolish the mischief of the doctrine of common employment and the defence of delegation. It put upon the employer an obligation to pay compensation for injuries caused to workmen:

- (1) *By defects in the works or plant of the employer.*
- (2) *By the negligence of any superintendent or other person in the service of the employer to whose orders the workman was bound to conform.*
- (3) *By defective by-laws or particular instructions of the employer.*

The Act provided certain statutory defences even in these cases. Thus the workman has no claim for injuries arising from defective machinery unless the defects had not been discovered owing to the negligence of the employer, or of someone in his service. Rules and by-laws approved by any department of the Government are not to

<sup>1</sup> *Williams v. Linotype & Machinery Ltd.*, [1914] 84 L.J.K.B. 1620.

be deemed defective. In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give notice thereof to his superior, he could not recover, unless he was aware that his employer or such superior already knew of the defect or negligence.

The amount of compensation was not to exceed the estimated earnings, during the three years preceding the injury, of a person in the same grade of employment in the district.

The Act repealing the 1880 Act<sup>1</sup> deals also with the measure of damages to be awarded in an action for damages for personal injuries. It provides, in effect, that the employer is to be credited with that portion of the pension rights of his workman for which the State has paid under the Industrial Injuries Act.

#### CHOICE OF ACTION

Proceedings under the Employers' Liability Act have needed careful consideration and have usually been only advisable where Common Law action was too risky.

The employer had not only had the statutory defences noticed above, but could also rely upon many Common Law defences such as 'contributory negligence', 'inevitable accident', '*volenti non fit injuria*', and even of 'common employment', where the person responsible for the accident was *not* entrusted with any authority by the master.

Therefore, if the accident was due to the carelessness of another *workman* or to an *unexplained* break in the tackle, the servant would formerly be advised to rest content with what was provided by the Workmen's Compensation Act, and would now seek compensation under the Industrial Injuries Act which has superseded those Acts.

If, on the other hand, there is clear negligence on the part of the master *personally*, then and only then should the servant be advised to risk enforcing his Common Law remedy, and go for full damages.

The doctrine of common employment having been thus disposed of, it will be convenient to consider the remaining defences open to proceedings at Common Law, or under special statute.

#### (2) CONTRIBUTORY NEGLIGENCE OF INJURED PERSON

A counter-attack is often the most effective defence, and this is eminently true of the defence of 'contributory negligence'.

The way to consider a case where the defence is involved is as follows: In the first place the plaintiff must establish negligence on the part of the defendant, and if he cannot do this the case is at an end as far as he is concerned. But even if he has done this, if the defendant in reply can prove negligence on the part of the plaintiff which *directly contributed* to the accident, so that the injury was occasioned by the

<sup>1</sup> Law Reform (Personal Injuries) Act, 1948.

joint negligence thus proved, then the principle of apportionment of fault may be applied.

Formerly the law was that if an injury happen to a servant while in the actual use of a defective machine in the course of his employment, and the accident was caused by the servant's carelessness so that his negligent use was the direct or proximate cause of the injury, then at Common Law the servant could not recover against anyone, although there would have been no accident if the machine had been in order.

#### AMENDMENT OF THE PRINCIPLE

It is important to note here that the Law Revision Committee on Contributory Negligence recommended the award of damages subject to apportionment in cases of personal injury where the injured person had been partly to blame, and that a Departmental Committee appointed by the Home Secretary in 1944 recommended that no distinction should be drawn in this respect between actions by workmen against their employers and other actions. Following upon this recommendation, the Law Reform (Contributory Negligence) Act, 1945, was passed, which provided in Section 1 (1) that:

'Where any person suffers damage as the result partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimants' share in the responsibility for the damage.'

This, in effect, introduced the principle of apportionment of liability in cases of contributory negligence just as the 'Admiralty Rule' does in cases of collision at sea. The principle has been applied in at least one recent case<sup>1</sup> where it was held that a defending firm of employers were in breach of statutory duties, but that the workman who had brought the action against them in respect of injury he had sustained was also at fault as regards his duty at Common Law to observe, for his own safety, the care which a prudent man would have observed. His failure to observe such care had contributed to the accident and, therefore, damages fell to be apportioned under the 1945 Act.

Where any case to which Section 1 (1) applies is tried with a jury, Section 1 (6) provides that the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.

This Act of 1945 applies to all cases of personal injury, including those resulting from industrial accidents.

<sup>1</sup> *Cakebread v. Hopping Bros. (Whetstone) Ltd.*, [1947] 1 All E.R. 389.

## CHAPTER THIRTY-FIVE

### PERSONAL INJURIES IN FACTORIES (*contd.*)

#### OTHER DEFENCES BY EMPLOYERS AGAINST CLAIMS FOR DAMAGES

##### VOLENTI NON FIT INJURIA

**WHERE** a person with full knowledge of the risk *voluntarily encounters danger* which is necessarily incidental to his employment, trusting to himself to keep from injury, the master is not liable if injury results.

This plea has been supported by the final report of the departmental committee, July, 1946, referred to on page 193. The report says, 'The tendency of recent decisions has been to minimise the application of this principle in employment cases. We had no evidence to suggest that in practice it involves hardship to workmen, and, while we recognise that the doctrine may assume greater importance now that contributory negligence is no longer in all cases a complete answer to an action for breach of Common Law duty, we do not feel able to recommend any change in the existing law'.

This defence is accepted with very considerable reservations; thus in the leading case on the point<sup>1</sup> a labourer was at work in a railway cutting with drills when a stone attached to a crane which was being passed over his head slipped and seriously injured him. The machinery used was not reasonably fit for the purpose but the workman knew of the defect. It was said in that case that *volenti* is not the same as *scienti*; the man might *know* of the defect, but he was not bound to throw himself out of work because his employer was negligent; and continuing his employment in these circumstances was not *the full consent* which the defence implies.

Similarly, if a servant knows of a defect in a machine which he is working, and complains to his master about it, but continues using the machine, he is not precluded from recovering damages if he is injured.<sup>2</sup>

For the defence to succeed, the work must be necessarily dangerous without any negligence or breach of duty on the part of the employer, and it must be undertaken with the fullest knowledge and consent on the part of the servant.

##### INEVITABLE ACCIDENT

If the effective and direct cause of a mishap was beyond the defendant's power to foresee or prevent he is not liable for the damage which results. As in the defence last considered, the cases where the rule is not applied are almost of more importance than those where it is accepted.

<sup>1</sup> *Smith v. Baker*, [1891] A.C. 323.

<sup>2</sup> *Holmes v. Worthington* (1861), 2 F. & F. 533.

A typical case where it was rejected was where severe frost caused a boiler pipe to burst, the boiler having been negligently left full overnight;<sup>1</sup> and at all times when lack of skill or foresight lies at the root of the trouble the defence will be unsuccessful, in spite of the fact that *at a later stage* the accident became inevitable.

On the other hand where a chain slipped from a crane, and it was established that it was commercially impracticable though not impossible to prevent the accident, the defence was accepted;<sup>2</sup> and also in the case of a misdirected blow from a sledge hammer.<sup>3</sup> Where a mishap, or the breaking of an appliance is unexplained, the employer is legally under no liability either to his servants or to strangers; but juries are prone to find negligence on very slender grounds when a poor man has been injured!

#### SCOPE OF EMPLOYMENT

A master is only liable for injury caused *to* his servant while that servant is acting within his employment. This principle was the basis of the Workmen's Compensation Acts and is now the basis of the National Insurance (Industrial Injuries) Act.

The same point arises, however, in respect of injuries caused to third parties *by* the negligence of a servant, for the master is obviously not liable for the consequences of his servant's negligence which is not connected with his work.

Assuming that the injury is to a stranger and not to a fellow-servant, a question may arise as to what acts are within the scope of the employment of the negligent servant and what acts are not. This question could have arisen, even in a 'common employment' defence before that doctrine was abolished, if the person guilty of negligence was in a position of authority.

#### ACTS WITHIN EXPRESS AUTHORITY

Where an act is expressly authorised, the master is responsible, whether the servant perform the act for his master's benefit or not. Thus to take a hypothetical case, assume the manager of a printing office, being in a position of trust, has become responsible for certain highly confidential designs that have been lithographed by the firm. Suppose that it is his duty at the proper time and place to show the designs on behalf of the customer to a third party, and then, taking advantage of his position, he makes a premature and secret disclosure to another person. He receives a sum of money from this person and leaves his master's service.

<sup>1</sup> *Sjordet v. Hall* (1828), 4 Bing 607.

<sup>2</sup> *Faulkes v. Poulson & Son*, [1892] 8 T.L.R. 687, 725 C.A.

<sup>3</sup> *Douglas v. Gray* (1890), 27 Sc.L.R. 687.

In such a case the master can be sued for the damage resulting to the customer, because he put a dishonest man in his own place to do this confidential work.<sup>1</sup>

But if, on the other hand, the *workman* who had prepared the design had been corruptly approached and had done the same thing, the master would not be liable for the dishonest act, since this time it was completely *outside the scope of the workman's employment*.

#### FORBIDDEN ACT FOR MASTER'S BENEFIT

There is another class of case, where a servant acts in the supposed interest of his master, but without authority or even in disobedience to an express order. Here, although the act may have been entirely unnecessary, the master's authority is presumed since the thing done was for his benefit.

An omnibus company issued printed instructions to its drivers not to race against the vehicles of a rival company. In spite of this, one of the men disobeyed the order and an accident occurred. It was held that the order given did not constitute any defence for the company, since the driver was anxious to secure a greater number of fares on their behalf.<sup>2</sup>

#### FATAL ACCIDENTS ACT, 1846

At Common Law the death of a human being gave no right of action to his relatives, and the right of compensation which exists to-day is entirely the creation of statute law.

The history of this development is curious and interesting. Most students will know that in the early days of English history payment in money or in kind was the proper remedy provided by the Common Law in order to obviate family feuds following upon death. In the course of time the criminal side of the law came to be clearly distinguished from the civil side and the payment of money was enforced by the King in a *prosecution as a fine*, and any sum exacted was therefore payable to the King and not to the relatives.

If the accident only resulted in an *injury* the sufferer had his *action* for damages. At the moment of his death, however, this right of action was lost, and if the man was killed outright, or died before obtaining judgment, his dependants were left without help.

This extraordinary position became insupportable in an age of mechanical power with its toll of fatal accidents, and in 1846 Lord Campbell's Fatal Accidents Act was passed, giving a right of action to the families of persons killed by another's wrongdoing. The action must be for the benefit of near relatives, i.e. wife or husband, children, grandchildren, parents and grandparents; and the claim is limited to

<sup>1</sup> *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716.

<sup>2</sup> *Limpus v. L.G.O.C.* (1862), 1 H. & C. 526 Ex. Ch.

a 'reasonable expectation of pecuniary benefit'. It was not made entirely clear, however, that this limited class of dependants who are entitled to sue would not have any right to damages which the deceased workman himself would not have had.

The Law Reform Act of 1934 provided that causes of action vested in any person will on his death transmit to his estate.

#### PECUNIARY BENEFIT

As a result, the claim in respect of the death of a wife or child is often necessarily small, while in the case of the father who is the sole support of his family it is substantial. In each case, however, the money loss is the only consideration, and not the grief or mental suffering of the family. Funeral expenses are not 'pecuniary loss', and cannot be recovered.<sup>1</sup>

#### LIMITS OF CLAIM

Although in principle, if damages are to be recoverable at all it might seem that the survivors are entitled to an annuity equivalent to the support of which they have been deprived, yet, in fact, juries assess the damages on a much more limited scale, the amount often being about four or five years' income.

Under the Employers' Liability Act it will be remembered that claims are to be limited to three years' wages, while under the Workmen's Compensation Acts the limit as to *time* was the same, with a further limit as to *amount* of £300 as a lump sum, with a children's allowance in addition which might have brought the total up to £600, or, with temporary increases, £700. The new National Insurance (Industrial Injuries) Act gives weekly pensions on a substantial scale to widow, widower or dependants.

#### PERIOD OF LIMITATION

Actions under Lord Campbell's Act must be brought within twelve months of the death. No action lies if the defendant was exempted from liability by the terms of a special contract, or if the deceased had accepted compensation in satisfaction of his right of action before he died.<sup>2</sup>

#### PUBLIC AUTHORITIES

Where an action lies against a public authority in respect of an act of negligence, it must be commenced 'within six months next after the act, neglect or default complained of'. The time is reckoned from the actual neglect<sup>3</sup> and not from the development of the injury, with

<sup>1</sup> *Clark v. L.G.O.C.*, [1906] 2 K.B. 648.

<sup>2</sup> *Haigh v. R.S.M.P.* (1883), 52 L.J.Q.B. 640 C.A.; *British Electric Railway v. Gentile*, [1914] A.C. 1034.

<sup>3</sup> Public Authorities Protection Act, 1893.



the result that at times an injured person may have his action barred before he knows the full extent of his injuries.<sup>1</sup>

Where, however, the injury results in death, the family may bring their action within the twelve months provided by Lord Campbell's Act and are not limited to the six months under the Public Authorities Act;<sup>2</sup> though if the injured man had survived six months after the accident and no writ had been issued, the claim in respect of the accident would have been wholly barred before he died, and his relatives could not sue afterwards.<sup>3</sup>

<sup>1</sup> *Freeborn v. Leeming*, [1926] 1 K.B. 160.

<sup>2</sup> *Venn v. Tedesco*, [1926] 2 K.B. 227.

<sup>3</sup> *Williams v. Mersey Docks & Harbour Board*, [1903] 1 K.B. 804.

## CHAPTER THIRTY-SIX

### THE WORKMEN'S COMPENSATION ACTS

#### DECIDED CASES

##### I. GENERAL

As already indicated in an earlier chapter, the Workmen's Compensation Acts have been repealed by the National Insurance Act, 1946. The Workmen's Compensation Acts will, however, continue in force as regards any cases of injuries decided under them before the repeal date, and, furthermore, the large body of cases arising on disputes under those Acts will continue to be of value in so far as they decide whether in specific circumstances the injury that occurred 'arose out of and in the course of' the injured person's employment.

The same test question is to apply in the administration of the National Insurance (Industrial Injuries) Act and it appears desirable to include here some notes given by the Authors illustrating the range of interpretation by the Courts up to 1929 of these words 'arising out of and in course of the employment'. The assumption referred to on page 192 should be noticed.

#### SCOPE OF EMPLOYMENT

##### ACCIDENTS

The words 'injury by accident' are construed exceedingly widely and include 'any unexpected personal injury resulting from any unlooked-for mishap or occurrence'.<sup>1</sup>

Thus a rupture was held to be an injury by an accident in the case last quoted; and so also was the introduction of a poisonous germ into the system through the skin. On the other hand a fit is not an accident,<sup>2</sup> and it is doubtful whether under any circumstances whatever an 'accidental injury' could result *exclusively* from a fit, so that compensation would be payable.<sup>3</sup>

##### ILLNESS AND ACCIDENTS

A serious difficulty arises when a man overcome by illness falls against moving machinery, or, as in a decided case, when a man unloading coal from a ship was seized with a fit *and fell into the hold*. It was held in the Court of Appeal that the direct cause of the injury was the nature of the employment and the illness was the remote cause only, and therefore the workman could recover. This decision is regarded with

<sup>1</sup> *Fenton v. Thorley*, [1903] A.C. 443.

<sup>2</sup> *Turvey v. Brintons*, [1904] 1 K.B. 328.

<sup>3</sup> *Hunter v. Simmer*, [1921] 14 B.W.C.C. 327.

some suspicion and the principle might well be reconsidered in the House of Lords.<sup>1</sup>

#### HEART DISEASE

Another difficult class of case exists where a man collapses from heart disease or some similar trouble whilst at his work. No claim is properly admissible if the man was merely exerting himself in his employment, as where a workman hurried to the railway station and died from heart disease.<sup>2</sup>

But where a workman suffering from a large aneurism of the aorta was tightening a nut with a spanner, and in consequence of the strain he ruptured the aorta and died immediately, it was held that the claim was good, although his condition was such that a very slight effort might have had this result at any time. 'I think', said Lord Loreburn in that case,<sup>3</sup> 'an accident may be something going wrong with the human frame itself, such as the straining of a muscle, or the breaking of a blood-vessel.'

In a case of this kind it would seem that the workman must be able to point to a definite incident which caused the mishap and that incident must be directly and exclusively connected with his employment.

#### POISONING

In cases of poisoning, where there can be no doubt at all that the injury arose from the employment, but where from the nature of the injury it is impossible to fix a precise date and incident, it appears that the requirements of the Act<sup>4</sup> as to notice are satisfied if the date of the occurrence of the 'accident' is reasonably fixed so as to connect the injury with the accident.<sup>5</sup>

#### COURSE OF EMPLOYMENT – ENTRY AND EXIT

The protection of the Act<sup>6</sup> is not limited to the times when the workman is actually at work, but is extended over the time while he is physically engaged in making his entry into or exit from the place where he is employed; as for example where he is injured on the ground floor or on the stairs whilst making his way to his ordinary place of work.<sup>6</sup>

#### MEAL-TIME

Nice points occur when the accident arises during meal-times, or any other legitimate interruption of the employment. This branch of the

<sup>1</sup> *Wicks v. Dowell & Co.*, [1905] 2 K.B. 225.

<sup>2</sup> *O'Hara v. Hayes*, [1910] 3 B.W.C.C. 586.

<sup>3</sup> *Clover, Clayton & Co. v. Hughes*, [1910] A.C. 242.

<sup>4</sup> Workmen's Compensation Act, 1925.

<sup>5</sup> *Innes v. Kynoch*, [1919] A.C. 765.

<sup>6</sup> *Smith v. South Normanton Colliery*, [1903] 1 K.B. 204.

subject was thoroughly discussed in the House of Lords in 1920 and the following passage from the judgment of Lord Finlay represents the present state of the law.

'If a workman, when eating his dinner is not doing anything for his master, how can it be that the mere permission to remain on the premises while he takes his meal renders the master liable? It would be another case if there were no dinner hour with its suspension of all work, and the workman merely snatched a hasty meal at his place of work. There is a short suspension of work during a short absence for any necessary purpose, going to a lavatory for instance, but this is no suspension of the course of employment.'<sup>1</sup>

The test, therefore, is whether or no the meal-time in the particular case constitutes a *suspension of employment*.

#### ACCIDENTS IN THE STREET DURING EMPLOYMENT

Absence from the place of employment connotes a suspension of the employment in every case where the workman has not been sent out upon the employer's business; in the latter case, however, the liability attaches throughout, though the accident arises from an ordinary peril of the streets.

In one case a boy in the employment of a firm of builders was ordered to go through the streets of London on a bicycle to fetch some plaster. He came into collision with a motor-car and was injured. His employers were held liable.<sup>2</sup>

Similarly where a commercial traveller, while driving his motor-cycle on business was killed by a falling tree in a high wind, the Court of Appeal decided (the Master of the Rolls dissenting) that the accident arose out of the employment, and not merely from the action of the elements.<sup>3</sup>

#### SUBSEQUENT SIMILAR INJURY AT HOME

It was recently decided that if a man dislocate his knee whilst at work, and recovers, and subsequently dislocates his knee again at home, he is not entitled to compensation in respect of the second accident, although it was rendered more likely to occur by reason of the first.<sup>4</sup>

Similarly, if a man loses one eye in the course of his employment but his earning capacity is not thereby diminished, he has no claim if he later loses the other eye through some cause not connected with the employment, and having no connection with the former accident.<sup>5</sup>

<sup>1</sup> *Armstrong v. Redford*, [1920] A.C. 757.

<sup>2</sup> *Dennis v. White*, [1917] A.C. 479.

<sup>3</sup> *Lawrence v. Matthews*, [1928] 166 L.T. 107.

<sup>4</sup> *Hutchinson v. Kiveton Park Colliery*, [1926] 1 K.B. 279.

<sup>5</sup> *Lomax v. Sutton Heath Colliery*, [1926] 126 L.T.J.

**RISKS FOREIGN TO THE NATURE OF THE EMPLOYMENT**

Under this heading will be discussed accidents which occur without any disobedience, wrongdoing, or act of supererogation on the part of the workman, but which arise in the normal carrying out of his work, by reason of an unlikely and entirely unlooked-for occurrence.

The principle involved is that *the peril need be in no way connected with the 'nature of the employment'*, if the risk (of however extraordinary a kind) was met *in the course of* the employment.

This principle was finally laid down in a case where a woman employed by a fish curer, while working in a shed belonging to her employer, was injured by the fall of a wall which was being built on the property of an adjoining proprietor, with the result that the roof of the shed collapsed, and the woman was buried under the wreckage. It was held that this accident 'arose out of her employment' within the meaning of the Act.<sup>1</sup>

**NATURAL RISK INTENSIFIED BY EMPLOYMENT**

Where the cause of the injury is of a very general kind, such as intense summer heat, the owner would be liable if the employment intensified the risk, e.g. if a workman was working a machine in an enclosed space under a glass roof; if, however, he was merely overcome with the heat while going an errand in the street, the employer would not be liable.<sup>2</sup>

**SCOPE OF EMPLOYMENT – FOOLISH ACTS**

Where a workman does a foolish or unnecessary act in the course of his work, this does not disentitle him from claiming compensation, except in cases of *serious and wilful misconduct*. Contributory negligence, or contravention of the Factory Acts, constitutes no answer in law.

Thus in a certain factory, notices were exhibited prohibiting girls from wearing their hair hanging down their back. A girl who had not heeded this order, which was not strictly enforced, was told to sit down and wait until she was required. She sat near a moving machine and her hair was caught in it, with serious consequences. She was held to have acted within the scope of her employment, her disregard of the rule did not amount to serious and wilful misconduct, and consequently her claim was good.<sup>3</sup>

**PROHIBITIONS RESTRICTING SPHERE OF DUTY**

A careful distinction must, however, be drawn between regulations which define the *manner* in which work is to be carried out and regulations which *restrict the sphere* of the workman's duties. In the words of Lord Dunedin in a leading case, 'There are prohibitions which *bind*

<sup>1</sup> *Thom v. Sinclair*, [1917] A.C. 127.

<sup>2</sup> *Roger v. Paisley School Board*, [1912] 5 B.W.C.C. 547.

<sup>3</sup> *McClure v. Matthews*, [1920] 13 B.W.C.C. 221.

*the sphere* of employment and prohibitions which only deal with conduct *within the sphere* of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent the recovery of compensation. A transgression of the former class carries with it the result that the man has gone *outside the sphere*.<sup>1</sup>

The outcome of this is that if the employer can prove a *genuine* prohibition restricting the scope of employment, he may have a complete answer to a claim of compensation. But if a notice has been posted in consequence of an accident, and then the prohibition has come to be generally disregarded on the score of convenience and to save time, it affords no defence.<sup>2</sup>

#### DEFINED DUTIES

Where a workman is employed to carry out certain clearly defined duties, and in breach of the implied terms of the contract he undertakes other tasks on his own initiative and is injured, the action does not arise 'out of and in the course of the employment'.

Thus where men take upon themselves to clean or adjust machinery, when they are employed only to carry out certain limited operations, they may not be protected; though it would be otherwise<sup>3</sup> *if their duties were not defined*, as where a boy standing idle was told to find a job, and injured himself while cleaning a wood-working machine.<sup>4</sup>

Acting upon the same principle, the Courts upheld an award of compensation to an unskilled labourer who voluntarily assisted a machinist to replace some loose belting on moving machinery.<sup>5</sup>

#### ORDERS WHICH OVERRIDE CONTRACT OF SERVICE

In this connection it must also be remembered that however the sphere of a man's employment may be defined, the orders of a person in authority will immediately operate to enlarge the sphere of employment, and may upon occasion make it embrace acts that had previously been strictly forbidden.

#### EMERGENCIES

Another exception may very properly be introduced where an emergency arises and a man acts outside the scope of his employment but in his master's interests.

#### ACT REASONABLE IN ALL THE CIRCUMSTANCES

The only proper test in cases where the scope of employment is doubtful,

<sup>1</sup> *Plumb v. Cobden Flour Mills*, [1914] A.C. 62.

<sup>2</sup> *Mellor v. Ashton*, [1921] 14 B.W.C.C. 128 C.A.

<sup>3</sup> *Low v. Pearson* (1889), 1 Q.B. 261.

<sup>4</sup> *Lane v. Lusty*, [1915] 3 K.B. 230.

<sup>5</sup> *M'Quibban v. Menzies*, [1900] 37 S.L.R. 526.

is whether the workman was acting in a manner which was reasonable in all the circumstances, or whether he was doing something which was totally unjustified.

The case noted above of the girl whose plait was caught in a machine, and whose claim succeeded, is in point here. In another somewhat similar case a workman, while waiting for his pay, seated himself, in accordance with the usual practice among the men, upon a stationary part of a machine; he slipped and his arm was caught between revolving rollers. His claim also was held to be good.<sup>1</sup>

On the other hand, if the act was not only unnecessary but also unreasonable, the claim is bad, as where a workman who had to replace belting on an overhead pulley chose to climb on to a sloping window ledge instead of using the ladder provided, and was killed.<sup>2</sup>

#### WORKMAN'S OWN PURPOSE

A further distinction must be drawn where the workman while not acting unreasonably, was doing something entirely *for his own purpose*; in these circumstances again he will be disentitled from recovering.

The following case illustrates the point neatly. In a printing factory an apprentice was injured while putting a tin of condensed milk away upon a ledge under moving machinery. It appeared that there was an ordinary practice among the day workers to conceal their provisions for tea from the night staff in this way, but the employers knew nothing about it. The apprentice's claim failed.<sup>3</sup>

The same plea defeated the claim of a girl who was combing her hair near moving machinery and dropped the comb. She stooped to pick it up and caught her hair in a machine.<sup>4</sup> This case is somewhat intriguing, the facts being so similar to the case where a girl ignored a prohibition from wearing her hair down her back and was injured. With a little consideration, however, two distinctions at least present themselves. First, as the prohibition against wearing a plait was habitually ignored in the factory, this had no bearing upon the case whatever. Secondly, in the combing case the girl was actively engaged in doing something for her own purposes, viz. combing her hair; in the plait case she was merely sitting close to the machine waiting for a job.

In border-line cases it is precisely points of this kind which turn the scale on one side or on the other.

#### ACCIDENTS IN THE STREET OUTSIDE EMPLOYMENT

Where a workman who was allowed to have tea on the premises went out to get milk and was knocked down by a motor-cycle in the street,

<sup>1</sup> *Mayor v. Leyland Rubber Co.*, [1920] 13 B.W.C.C. 115 C.A.

<sup>2</sup> *Russell v. Murray*, [1915] 9 B.W.C.C. 81.

<sup>3</sup> *Keen v. St. Clement's Press*, [1914] 7 B.W.C.C. 542.

<sup>4</sup> *Heathcote v. Grimsby Cordage Co.*, [1920] 13 B.W.C.C. 1.

no compensation was payable, since he was discharging no duty to his employer imposed by his contract of service.<sup>1</sup>

The following was a difficult case. A butcher-boy was allowed to go home to tea and usually went by tram, but if he had orders to take on the way he used his bicycle. Whilst making such a journey with an order on the way home and another on the way back to the shop, he was injured. The Court of Appeal held that the boy was not obliged to go home to tea, and could have gone elsewhere, and that the accident did not arise in the course of his employment.<sup>2</sup>

This decision appears, if correctly reported, to be by no means easy to reconcile with the accepted principles.

<sup>1</sup> *Pruce v. Davy*, [1927] 136 L.T. 601.

<sup>2</sup> *Lye v. British & Argentine Meat Co.*, [1927] 20 B.W.C.C. 341 C.A.



## CHAPTER THIRTY-SEVEN

### THE WORKMEN'S COMPENSATION ACTS

#### DECIDED CASES (*contd.*)

#### II. MISCONDUCT

##### LARKING

ACCIDENTS arising from horseplay indulged in by the workmen provide a perplexing class of case. The generally established principle is that there is no liability for an injury either to the parties to the larking, or to anyone else who is injured thereby.

In one case a boy pushed another into a pit on the works; the latter became angry and threw a piece of iron which missed the former boy but injured another workman in the eye. The Court of Appeal said that the statute does not provide an insurance against every accident happening to the workman whilst he is engaged in the employment of his master, but only against accidents arising out of and in the course of that employment.

It was as entirely out of the scope of the employment of the one to do the act which caused the injury, as it was outside the scope of the employment of the other to be exposed to such an injury.<sup>1</sup>

##### ASSAULTS

This principle has been applied in a large number of cases of assault, but it has been suggested that it is by no means always applicable. For example, it is quite definitely decided that where a school teacher is the victim of a concerted assault by the boys, there is an accident arising out of the employment, though the House of Lords was divided upon the point.<sup>2</sup>

Two years later a clear 'larking case' was decided in favour of the workman, where the work consisted of picking stones out of coal, and the County Court judge found that the mischievous tendency of boys to throw stones was a risk arising out of the employment.<sup>3</sup>

It is naturally felt in view of these decisions that the position is none too well established, and wherever the unwarranted act is closely associated with the employment the Court will be quick to distinguish it from an ordinary 'larking' case. So where two workmen were disputing about the use of a brush to oil a machine, and then one of them snatched it from the other, injuring his hand, it was held that this was an accident within the operation of the statute.<sup>4</sup>

<sup>1</sup> *Armitage v. Lancashire & Yorkshire Rly.*, [1902] 2 K.B. 178 C.A.

<sup>2</sup> *Trim District School v. Kelly*, [1914] A.C. 667.

<sup>3</sup> *Clayton v. Hardwick Colliery*, [1915] 114 L.T. 241.

<sup>4</sup> *McIntyre v. Rodgers*, [1903] 6 F. 176.

If ever the Courts take a more lenient view as to 'larking' claims, this will be a logical extension of the principle that 'the peril need be in no way connected with the *nature* of the employment', illustrated by the case of the wall which fell on the fish curer.<sup>1</sup>

#### DRUNKENNESS

Where it is proved that the workman was drunk at the time of the accident the Court may take one of two views. It may be said that the intoxication was the sole effective cause of the accident, that nothing arising out of the employment caused it in any way, and that, therefore, the claim is bad.<sup>2</sup> The alternative view is that the drunkenness in such a case caused an *interruption* in the course of the employment, which was therefore suspended until the man was once more sober, with a consequent relief from liability on the part of the employer.<sup>3</sup>

Where, however, the danger arises from the employment, but the workman is merely careless because of his condition, the Court may or may not regard his drunkenness as 'serious and wilful misconduct' with the special consequences which the statute provides.<sup>4</sup> Thus a drunken stableman had to ascend a vertical ladder to a loft and fell; in spite of his intoxicated condition the claim was successful.<sup>5</sup>

#### MINOR DISOBEDIENCE

Disobedience to a rule which merely affects the conduct of the workman at his appointed job, and does not restrict his sphere of duty, is not sufficient to disentitle him to claim unless it amounts to 'serious and wilful misconduct'.

Thus if a workman whose duty it is to oil a machine has been told not to oil it while it is in motion,<sup>6</sup> or if he is forbidden to sit down while supervising the working of a dangerous machine,<sup>7</sup> he can still recover though the accident occurred owing to his failure to observe the regulations.

#### FLAGRANT DISOBEDIENCE

Where the disobedience is flagrant and wilful, other considerations arise, and the statute provides that in these extreme cases the workman shall have no remedy *in respect of minor claims*. The boundary line can only be fixed according to the particular facts of each particular case.

<sup>1</sup> See page 216.

<sup>2</sup> *Thomson v. Anderson*, [1922] 126 L.T. 386.

<sup>3</sup> *McCrae v. Renfrew*, [1914] 7 B.W.C.C. 898.

<sup>4</sup> See page 216.

<sup>5</sup> *Williams v. Llandudno Coaching Co.*, [1915] 2 K.B. 101.

<sup>6</sup> *Maudsley v. West Leigh Colliery*, [1911] 5 B.W.C.C. 80.

<sup>7</sup> *Chilton v. Blair*, [1915] 307 L.R. 623.

## SERIOUS MISCONDUCT AND DISOBEDIENCE

The general rule is that if the employer can prove that the injury is attributable to the workman's own serious and wilful misconduct the claim for compensation is to be disallowed *unless* the injury results in death or serious permanent disablement.

An important amendment to the consolidating Act of 1925 takes a slightly different line and forms an additional protection for the workman. This further provision is that where death or serious and permanent disablement results, the accident is 'deemed to arise out of and in the course of the employment' *whenever* the workman was acting for the purposes of, and *in connection with*, his employer's trade or business. It does not matter if the workman was acting in direct disobedience to a statutory regulation, or to his employer's orders; if the disablement is serious and permanent, *and* if he was acting for the purpose of the business, he is entitled to recover.<sup>1</sup>

## DECISIONS ON THE AMENDMENT

There are a few important decisions on the amendment referred to. Thus there is no protection where the act of the workman was not only forbidden, but was done 'for the purposes of the workman', and *not* in connection with the employer's business.<sup>2</sup>

In this case the workman, in spite of orders, was in the habit of going to a place of particular danger in a colliery, to hang up his coat and eat his food. He fell into a hole and was fatally injured, but no compensation was payable.

That case may be contrasted with the next, where a workman, going a journey in the course of his employment, and at his master's expense, jumped from a moving train and was injured. He was held to be covered, the act being in connection with his employment.<sup>3</sup>

Similarly, an electrician who under a bona fide mistake entered a cubicle against orders, where certain high-tension electrical gear was in use, instead of the cubicle where work was required, was held to be working for the purposes of his employer's business, and the claim was good.<sup>4</sup>

## RESTRICTIONS ON THE AMENDING PROVISIONS

In several cases claims under the amending provisions of 1925 have been disallowed where the workman was carrying out duties *in connection with* his master's business, *but which he was not engaged to perform*, and which, therefore, were not within the scope of the employment.<sup>5</sup>

<sup>1</sup> Section 1 (2).

<sup>2</sup> *Davies v. Gwauncaeurgurwen Colliery Co.*, [1924] 2 K.B. 651; see also *Thomas v. Pentremaw Colliery Co.*, [1926] 136 L.T. 208.

<sup>3</sup> *Altobelli v. Ellis & Sons*, [1926] 136 L.T. 602.

<sup>4</sup> *Carter v. British Thomson Houston Co.*, [1927] 137 L.T. 329.

<sup>5</sup> *Kerr v. Dunlop*, [1926] A.C. 377.

In one case a man took work home in order to increase his skill and experience and injured himself.<sup>1</sup> In another particularly hard case it was held that an attempted rescue, though in connection with the business, was not *in the scope of the employment*.<sup>2</sup> Again, where a workman proceeded to his work by a forbidden route, and attempted to get a lift on a passing engine (which was also forbidden), it was held that he had no claim, these acts being outside the sphere of his employment.<sup>3</sup>

The net result of the amending provisions, as applied by the Courts, would seem to be that they make remarkably little difference to the master's position. For if the act done for the benefit of the master's business was in fact outside the scope of employment, whether its boundary was expressly defined or only implied, then no amount of zeal in the master's interest can bring the act within the scope of employment. The only kind of order affected by the subsection is the kind which regulates conduct *within the sphere of work*, and as we have seen the position here has always been that trivial disobedience does not disentitle the workman from claiming.

<sup>1</sup> *Borley v. Ockenden*, [1925] 2 K.B. 325.

<sup>2</sup> *Jones v. Tarr*, [1926] 1 K.B. 25.

<sup>3</sup> *Clarke v. Southern Railway*, [1927] 137 L.T. 200.

## CHAPTER THIRTY-EIGHT

### THE TRUCK ACTS

THE Truck Acts require that wages shall be paid in money only. Payment in goods, therefore, or otherwise than in coin, is illegal.

Any express or implied agreement as to the manner or place in which wages are to be spent (for the worker's private use) is illegal.

All fines or deductions or charges in respect of (a) bad work, or (b) damaged goods, or (c) materials or articles to be used in relation to the work, are illegal unless made in pursuance of a contract between the employer and the worker or, in the case of deductions for bad work, in pursuance of a 'notice'. The contract must be in writing or there must be a notice affixed in the factory, and a copy must be given to each worker, when the contract is made.

In the case of fines the contract must specify clearly the matter in respect of which a fine may be imposed and the amount of the fine.

In the case of damaged materials or articles used in relation to the work, the charge must in no case exceed the cost thereof to the employer.

No fine or deduction or charge (nor any contract respecting the same) is legal unless it is fair and reasonable.

Written particulars must be given to the worker on each occasion when a fine or deduction or charge is made.

A register of all fines imposed must be kept.

The contract and register must be produced on demand of H.M. Inspector.

A copy of the contract must be given to any worker on demand.

A deduction in respect of food cooked and eaten on the premises is illegal unless made in pursuance of a special contract in writing signed by each worker.

A breach of the Truck Acts not merely entitles the worker to recover the fine or deduction, or the wages paid in the form of goods, but is also punishable by penalty on summary conviction.

#### SOME RECENT CASES AND LEGISLATION

Some recent cases on the validity of deductions are of interest. The decision in the first<sup>1</sup> was to the effect that a payment made to the creditor of the workman might be a good payment to the workman himself. In the second case<sup>2</sup> the House of Lords said that it would not be a good payment if the creditor happened to be the employer as in this case where the employer sought to deduct from a worker's wages

<sup>1</sup> *Hewlett v. Allen & Sons*, [1892] 2 Q.B. 662.

<sup>2</sup> *Penman v. Fife Coal Co.*, [1935] 104 L.J.P.C. 74.

sums on account of rent for a house owned by the employer and occupied by the worker's father.

In the third case<sup>1</sup> the circumstances were that the employers had attempted over a period to get outside the restrictions of the Truck Acts. By arrangement with the worker they had deducted certain amounts to meet the value of shares allotted to her 'and doubtless conceived themselves to be doing a right and proper thing'. They had the Acts in mind, however, and adopted the device of two envelopes to bring the payment of wages within the requirement of the Acts that it must be complete and in coin of the realm. The payment by special envelope was only a colourable one, not a real one, and the worker was found entitled to recover so much of her wages as had been actually paid not in current coin.

Then more recently the House of Lords, by a majority of four judges to one, held that the Truck Act of 1831, on its proper construction, did not permit the supply of the goods and services mentioned in its Section 23 to be made by way of wages and that the worker was entitled to recover the amount represented by the provision of dinner and tea to the admitted value of 10s. a week provided by the employers under their roof and there consumed by the worker over a period of fifteen years.<sup>2</sup>

An Act was passed in 1940<sup>3</sup> to provide a remedy to employers against vexatious actions by workers for recovery of amounts deducted where the deductions were illegal under the older statutes but would have been lawful deductions if an agreement had been made in writing and signed by the worker.

<sup>1</sup> *Kenyon v. Darwen Cotton Mfg. Co.*, [1936] 2 K.B. 193.

<sup>2</sup> *Pratt v. Cook, Son & Co.*, [1940] T.L.R. 363.

<sup>3</sup> Truck Act, 1940.

## CHAPTER THIRTY-NINE

### MASTER AND SERVANT

#### FORMATION OF CONTRACT AND TERMINATION BY NOTICE

##### EMPLOYERS AND WORKMEN ACT, 1875

WHEN a dispute between a master and his servant arises out of the contract of service, the amount involved is often trifling, though an important issue of principle may be involved, or an equally vital point of discipline.

It is therefore useful to bear in mind that Parliament has provided a method of dealing with these disputes which is as economical as it is expeditious.

Under the Employers and Workmen Act, 1875, police courts have a special jurisdiction where the sum involved is not more than £10, and in these cases the maximum cost which the court may allow for employing a solicitor is 15s. Proceedings under the Act can also be commenced in the county courts when larger sums are involved; and in either court there is a special power *to enforce the performance of a contract* by taking security from the party at fault instead of awarding damages.

##### FORMATION OF CONTRACT

At common law verbal contracts of service are enforceable, provided all the requirements of a 'simple contract' are fulfilled, i.e. an unqualified offer and acceptance, 'consideration' to support the mutual promises, capacity of the parties to contract, and legality of the object.

The question of 'capacity' comes into prominence in relation to apprentices and other servants who may be under age. This point will be dealt with under the general heading of 'Apprenticeship'.<sup>1</sup>

##### WHEN WRITING IS NEEDED

Many contracts of service, however, come within that provision of the Statute of Frauds, 1677, which lays down that no action is to be brought upon *any agreement that is not to be performed within the space of one year* from the making thereof, *unless* there is an agreement or some memorandum in writing signed *by the party to be charged* or his authorised agent.

Clearly then a two years' agreement, subject to a six months' notice on either side to be given at any time, is unenforceable if it is merely verbal;<sup>2</sup> but what is the position if it is merely a twelve months' agreement?

<sup>1</sup> See page 236.

<sup>2</sup> *Hanau v. Ehrlich*, [1911] 105 L.T. 320, C.A.

*If, as is usually the case, the service starts some days or weeks after the making of the contract, the twelve months cannot be completed within a year from the date of the contract, and written evidence is needed. If, however, the service starts the following day, then the law takes no notice of the part of the day remaining after the agreement was made, and regards it as a contract to be performed within the year, and accordingly such an agreement is enforceable though only verbal.*<sup>1</sup>

#### IMPLIED TERMS EXCLUDED

Where there is an enforceable contract, but no stipulation as to length of service has been made, the law implies certain reasonable conditions as to notice of termination and sundry other matters which will be considered in due course. But if there is an existing verbal contract (e.g. for two years certain) which is merely unenforceable on account of the Statute of Frauds, then no new contract can be assumed in the place of it, with implied conditions as to notice and wages.<sup>2</sup>

In such a case the servant cannot plead the equitable doctrine of 'part performance' which in certain cases operates to relieve the victim of unfair treatment, e.g. in a verbal agreement to lease or sell land; he is bound by a contract which the law recognises as existing but unenforceable. *Thus, if there is a verbal contract for two years' service, and the servant is discharged without notice after six months, he has no remedy.*

If he had merely been engaged as a monthly servant he could claim a month's wages, because the Statute of Frauds does not apply to contracts which are entirely indefinite as to time, and which therefore may or may not be completed within the year.<sup>3</sup>

#### ADDITIONAL STIPULATIONS

Where a contract of service is written, oral evidence is usually inadmissible to explain or amplify it. Thus in one case an agreement read as follows: 'I agree to receive you as clerk in my establishment in consideration of your paying me a premium of £300 and to pay you a salary at the following rates, namely, for the first year £70, for the second £90, for the third £110, &c.' It was held that there being a precise stipulation for yearly payments, evidence was not admissible to show that there was a later verbal agreement that the salary should be paid quarterly; and it was further held that the fact of the payments having usually been made quarterly did not vary the rights of the parties under the agreement.<sup>4</sup>

#### HOLIDAYS

Upon termination of a servant's contract on notice, a claim is often

<sup>1</sup> *Cawthorne v. Cordrey* (1863), 13 C.B.N.S. 406. See also pages 2 and 3, *ante*.

<sup>2</sup> *Britain v. Rossiter* (1879), 11 Q.B.D. 123.

<sup>3</sup> *McGregor v. McGregor* (1888), 21 Q.B.D. 424.

<sup>4</sup> *Giraud v. Richmond* (1846), 2 C.B. 835.



made for wages in lieu of holidays. The enforceability of such a claim entirely depends upon the terms of the particular contract, but the following case may be found useful.

A master had agreed that his servant should in each calendar year (but not in each year of the servant's service), be entitled to a holiday; the servant whose last holiday was in June, 1914, was dismissed in August, 1915. It was held that he was *not* entitled to a week's wages in lieu of the holiday.<sup>1</sup>

#### TERMINATION OF SERVICE

A contract of service is terminated like any other contract, by the death of either party, or by impossibility of performance (e.g. permanent incapacity by illness), or according to the express terms of the contract, or by agreement. Apart from these eventualities, the remaining position is where the contract, whether verbal or written, makes no provision for termination, and one party wishes to end it against the will of the other. The question which then arises is whether notice must be given, and if so for what time.

An ill-founded notion is not infrequently met with, that the length of notice necessary is automatically regulated by the period of wage payment. In fact this is only one of several circumstances from which the Court will decide, first whether there was an implied condition as to length of notice and, failing that, what is a reasonable notice for the determination of that particular contract.

Thus, in the case of a workman, wages may be calculated on the hours worked, at a fixed rate per hour, and paid weekly; notwithstanding these facts the service may be a 'daily hiring' terminable at a day's notice.

In a day-to-day contract such as that of a dock labourer who is engaged each morning, whose wages are paid at the close of each day, and who has no right to be employed on the following day, no notice of any kind is needed.<sup>2</sup>

Conversely, a manager may draw his salary monthly or quarterly, and yet he may successfully contend that his is a yearly hiring and that he is entitled to a year's notice. It is a question for the jury in each case. Needless to say in such a case the salary must have been fixed as so much a year, the interval of payments being a subsidiary matter altogether.

The result is, therefore, that each case must be decided upon its special circumstances, the period between wage payments, and the method in which salary is expressed, affording some indication of an implied stipulation.

<sup>1</sup> *Hurt v. Sheffield Corporation*, [1916] 85 L.J.K.B. 1684.

<sup>2</sup> *Price v. Guest, Keen & Nettlefolds*, [1918] A.C. 760.

## CUSTOMARY NOTICE

If there is no stipulation either express or implied, it becomes necessary to consider first whether a custom has been proved, and failing that what is a 'reasonable notice in the circumstances'.

## AGENTS

The foundation of the legal position here is, of course, the relationship of *master and servant*, and in the case of a *commercial traveller* who agrees with several traders to canvass for customers, and to receive a share of the profits, the same terms to apply to repeat orders, such an *agency* can be determined at any time without notice; but notwithstanding the termination, the agent *may* be entitled to commission on subsequent orders from customers introduced by him.<sup>1</sup>

On this principle advertisement agents have sometimes claimed that although their engagement with the publisher of a paper has been terminated, there is a custom of the trade whereby they are entitled to commission on all advertisements which may appear in that publisher's paper from a customer who had been introduced by the agent in the first instance.

It was contended in one case that the custom extended to all renewals made within twelve months from the first publication. Evidence was heard on both sides, and it was held that the custom was not proved, and the defendants recovered judgment accordingly.<sup>2</sup>

## REASONABLE NOTICE

In the case of editors and sub-editors of newspapers reasonable notice has been proved to be twelve and six months respectively,<sup>3</sup> in the case of commercial travellers (if they are servants and not merely agents), and clerks in superior positions, three months.<sup>4</sup>

In the case of journalists contributing weekly notes, employees canvassing for advertisements, or 'selling space' as the trade description goes, and clerks, one month is reasonable notice.<sup>5</sup>

These cases are cited as examples that have been accepted as reasonable by the Court, and as customs proved as existing to the satisfaction of a jury. The principle is always that the custom must be general, of reasonable antiquity and uniformity, and sufficiently notorious that people would make their contracts on the supposition that it exists.<sup>6</sup>

<sup>1</sup> *Levy v. Goldhill*, [1917] 2 Ch. 297.

<sup>2</sup> *Bettany v. Eastern Morning and Hull News*, [1900] 16 T.L.R. 401.

<sup>3</sup> *Grundy v. Sun Printing and Publishing Association*, [1916] 33 T.L.R. 77.

<sup>4</sup> *Metzner v. Bolton* (1854), 9 Ex. 518; *Fairman v. Oakford* (1860), 5 H. & N. 635.

<sup>5</sup> *Re Illustrated Newspaper Corporation*, [1900] 16 T.L.R. 157; *Hiscox v. Batchelor* (1867),

15 L.T. 543; *Vibert v. Eastern Telegraph Co.* (1883), Cab. & El. 17.

<sup>6</sup> *Foxall v. International Land Credit Co.* (1867), 16 L.T. 637.

## NOTICE TO TERMINATE A PRINTING CONTRACT

In this connection it may be observed that a usage has been proved to exist in the printing trade, that newspaper proprietors shall give four weeks' notice to printers before taking the work from them, or pay them four weeks' wages instead.<sup>1</sup>

This was in the case of a weekly publication, and no doubt in the case of dailies and monthlies a different notice might be proved to be customary or reasonable.

In that case none of the witnesses could produce instances showing that the usage was mutual, and that printers were under an equivalent obligation to give notice to newspaper proprietors.

It is also interesting to notice a judicial intimation that 'there could not be any usage with respect to Sunday newspapers, as they had only existed for a short time'.

## WHEN NOTICE MAY BE GIVEN

If a contract merely stipulates the *length* of notice and is silent on the point of *when* the notice may be given, it may terminate at any time, and not merely on pay-day. In one case the clause to be construed read as follows: 'The engagement may be determined at any time, by three months' notice in writing on either side'; and it was held that the notice need not terminate at any particular time.<sup>2</sup> The same construction was applied where the words were: 'This agreement is liable to be determined by either party giving three months' notice'.<sup>3</sup>

There is no reason, however, why evidence should not be accepted in any particular case of a custom that the notice may only terminate at the end of the week or month, as in the case of tenancies; in the absence of such evidence the general law is as previously stated.<sup>4</sup>

Whatever notice is legally necessary to terminate the service is equally necessary where it is desired to substitute a fresh contract, e.g. with altered wages or hours of work; though for obvious reasons such notice is frequently dispensed with by agreement.

<sup>1</sup> *Cunningham v. Fonblaque* (1833), 6 C. & P. 44.

<sup>2</sup> *Hann v. Plymouth Corporation*, [1910] 9 L.G.R. 61.

<sup>3</sup> *Ryan v. Jenkinson* (1855), 25 L.J.Q.B. 11.

<sup>4</sup> *Butterfield v. Marler* (1851), 3 Car. & Kir. 163.

## CHAPTER FORTY

### — MASTER AND SERVANT (*contd.*)

#### CONTRACT BECOMING IMPOSSIBLE OF PERFORMANCE

##### ILLNESS

AN everyday problem of the law of master and servant relates to the right of a master to dismiss his servant when the latter becomes ill, and to the liability of the master in respect of wages at such times. The principle is the same whether the hiring is weekly, monthly or yearly, and the key lies in the answer to a preliminary question. Is the illness of such a kind as to make the contract *impossible of performance*, and thus to bring it to an end? If so there is no liability for wages on the part of the master, and no liability for breach of contract on the part of the servant.

The case of a singer or of a pianoforte player taken ill before a performance exemplifies the position in its simplest form, and it is well settled that in such a case the continued good health of the performer is a condition 'annexed to the agreement'. Either death or incapacitating illness brings the contract to an end at once and discharges both sides from their obligations.<sup>1</sup>

The position of an ordinary servant is, of course, very different from that of a performer, and *temporary* illness by no means brings the contract to an end. For example, in one case the plaintiff entered the defendant's service for a period of five years at a yearly salary, the plaintiff undertaking to devote the whole of his time to the defendant's business. During the period the plaintiff became temporarily ill, and was in consequence prevented from performing his work. It was held that he was entitled to his salary during the time of his illness.<sup>2</sup>

Similarly, where a servant who becomes temporarily incapacitated by illness is paid so much per week of fifty hours, the question may arise as to whether he is or is not entitled to claim wages during illness. Such a hiring may be a daily hiring, and more probably is a weekly hiring, according to the notice necessary to terminate it. *In either case unless notice is given, and the service is properly terminated, the liability to pay wages continues.*

##### ILLNESS OR MISCONDUCT

The same principle was applied in another case where the facts are exceedingly illuminating. The plaintiff was engaged as a mercantile clerk at £120 per annum, and was to have one month's notice of dis-

<sup>1</sup> *Robinson v. Davison* (1871), L.R. 6 Ex. 269.

<sup>2</sup> *Warren v. Whittingham*, [1902] 18 T.L.R. 508.

missal. He began his duties on 2nd July and served until 12th August. From that date he was obliged to be absent on account of venereal disease which was contracted before the engagement was entered into, but the clerk at that time had no idea that he was suffering in this way.

On 20th August the firm wrote terminating the engagement summarily, and an action was brought to recover wages accrued due from 1st August to 20th September. On appeal from the Mayor's and City of London Court it was held that the plaintiff was entitled to wages for that period, and that it was no answer to his claim that the illness was caused by an act of misconduct on his part which occurred before the contract, and which he did not then know would render him incapable of performing his work.<sup>1</sup>

In other cases *where the illness was permanent*, and rendered the contract impossible of being carried out, the service automatically came to an end without notice, just as in the case of death.<sup>2</sup>

#### ILLNESS IN THE PRINTING INDUSTRY

By a decision by the Court of Appeal<sup>3</sup> an employer was found liable to pay wages to an employee who had been absent from work through illness during an unbroken period of years. This decision caused some concern among employers in general who had not been in the habit of giving notice of termination of employment to workers who had absented themselves through illness. Some employees in the printing industry made claims for periods during which they had been absent without receiving notice of termination, but on advice given them the employers had resisted the claims on the ground that in the printing industry the practice was to pay no wages during illness, and no claim was pressed.

To formally confirm this practice as a well-established one by which employees were bound, a meeting between representatives of the employers' organisations and the trade unions was held in 1939 and unanimous approval was given to the issuing of a circular letter to all members of the British Federation of Master Printers and the Newspaper Society advising them:

- (a) that the legal right of an employee, in the absence of any arrangement to the contrary, to claim payment of wages for any period of temporary absence from work due to illness had been long established;
- (b) that that right was well known to the trade unions, but that the trade unions had never sought to interfere with what they

<sup>1</sup> *K— v. Raschen* (1878), 38 L.T. 38.

<sup>2</sup> *Boast v. Firth* (1868), 19 L.T. 264; L.R. 4 C.P.I.

<sup>3</sup> *Marrison v. Bell*, [1939] 2 K.B. 187.

recognised as the established custom of the industry, namely, not to pay wages to workers in respect of time lost through absence due to illness.

The letter advised the members to continue to follow their existing practice in their own offices without regard to the decision of the Court of Appeal.

A judgment by the Mayor's and City of London Court on 30th June, 1941,<sup>1</sup> in which the *Marrison* case was referred to, said that the custom of the trade not to pay wages during illness had been absolutely proved to the Court's satisfaction.

#### STRIKES AND BREAKDOWNS

The law is, therefore, that unless and until the contract is ended by notice or, as we shall see, summarily for misconduct, or by reason of impossibility of performance, the master has no legal right (apart from agreement or custom) to stop the servant's wages on account of absence caused by temporary illness or any other reason.

A breakdown of machinery with the result that the master has no work for his men does not in any way discharge him from his liability to pay wages, nor does it terminate the contract by 'impossibility of performance'.

The latter doctrine in this connection relates to something of the nature of an act of God, such as a fire which destroys the premises completely. An example of this occurred in a well-known case which related to the hiring of a music-hall. The building was gutted by fire and an action was brought on the contract of hiring. The judge held that it was an implied condition of the contract that the premises should continue to exist.<sup>2</sup>

Conversely, in a contract by which the plaintiff was employed as *outside traveller*, agent and canvasser, it was held that the destruction of the master's factory did *not* excuse the master from fulfilling his agreement,<sup>3</sup> because in that case the traveller's contract was not directly connected with the premises.

A coal strike or a railway strike similarly are not occurrences which will legally discharge contracts between masters and servants, or between printers and their customers; but a requisition of fuel, of electric supply, of paper or of the presses themselves, by the Government would be a sufficient defence to an action for damages incurred by reason of delay in completing a contract.

<sup>1</sup> *J. J. Mason v. C. & E. Layton Ltd.*

<sup>2</sup> *Taylor v. Caldwell* (1863), 3 B. & S. 826.

<sup>3</sup> *Turner v. Goldsmith*, [1891] 1 Q.B. 544.

## CHAPTER FORTY-ONE

### MASTER AND SERVANT (*contd.*).

#### SUMMARY DISMISSAL AND REPUDIATION OF CONTRACT

##### SUMMARY DISMISSAL

THE next topic to be considered is that of dismissal without notice, and the occasions which justify this treatment. Generally speaking, if a servant is guilty of serious misconduct or disobedience his master is justified in dismissing him without notice.

'There is no fixed rule of law defining the degree of misconduct which will justify dismissal,' said Lord James of Hereford in the House of Lords. 'Of course there might be misconduct<sup>1</sup> in a servant which will not justify the determination of the contract of service. On the other hand misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.' He then proceeded to consider the effect of drunkenness. 'The intoxication may be habitual and gross, and directly interfere with the business of the employer or with the ability of the servant to render due service. But it may be an isolated act committed under circumstances of festivity and in no way connected with or affecting the employer's business. In such a case the question whether the misconduct establishes the right to dismiss the servant must depend upon the facts.'

Unjustifiable absence from work may justify summary dismissal though the immediate cause is outside the servant's control, e.g. imprisonment; on the other hand unpunctuality would hardly be a sufficient reason unless it had occurred frequently and after warning.

##### NEGLIGENCE

The principles applicable to an act of negligence are strictly analogous. The law was stated some years ago by Mr. Justice Darling, as he then was, in a case where serious damage had been caused to a printing machine. It appeared that a roller known as the 'top rider' had jammed under the cylinder, apparently because the servant had neglected to place one end of the 'top rider' in the 'forks'.

'I do not say that neglect would be a good ground for dismissal in every case, but to forget to do a thing which, if not done, may cause considerable damage to the master, or to his property, or to his fellow servants, may be a serious neglect of duty.

'In the case before us the machine was worth £800, and the appellant's forgetfulness caused damage to the amount of £30. I think there was evidence of neglect to justify his dismissal.'

<sup>1</sup> *Clonston & Co. Ltd. v. Corry*, [1905] A.C. 122.

<sup>2</sup> *Baster v. London & County Printing Works*, [1899] 1 Q.B. 901.

**DISHONESTY**

Similarly if a servant is detected in an act of dishonesty he may be dismissed without notice; and this principle extends to cases where a servant enters into contracts and transactions with third parties which, though not in themselves dishonest, are incompatible with the efficient carrying out of the contract of service. A servant, like a trustee, cannot be allowed to put himself into a position where his interests conflict with his duties.<sup>1</sup>

Where good and sufficient reason for summary dismissal exists in fact, the employer is under no obligation to state his reason at the time.<sup>2</sup> Indeed, if the circumstances justifying the drastic step exist, it is immaterial that they only come to the master's knowledge after the dismissal. The master *may* therefore be protected though he acted upon mere suspicion, or upon another matter altogether.

**DISOBEDIENCE**

Where the alleged misconduct consists of disobedience the position is substantially different, and the result depends upon the grade of employment. Obviously a servant in a subordinate position may reasonably be required to obey any lawful command which does not entail any risk to life or limb, in connection with the employment.

A servant in a responsible position, as a manager, on the other hand, may be entrusted with a variety of important duties which it is impossible for him to discharge unless in reason he can have a free hand. Disobedience to certain orders on the part of such a servant would not justify instant dismissal.

This point was decided in a case<sup>3</sup> where an employer, a lace dealer, was on bad terms with his buyer, and seeing him unemployed in the warehouse, desired him to fold some lace on cards, which the plaintiff refused to do, deeming the work derogatory and unbecoming his position. The employer dismissed him on the spot. The buyer's contract was for three years at a yearly salary of £500, payable monthly. He was awarded £375 damages for wrongful dismissal.

**REFUSAL TO WORK OVERTIME**

A flat refusal to work reasonable overtime is usually a sufficient reason to justify summary dismissal.

The point frequently arises in connection with action by a trades union, when such a body forbids its members to work overtime without special permission. If the master discharges a recalcitrant workman on the spot he may well be faced with an action for wrongful dismissal. If he can prove (a) that there is a custom of the trade to work over-

<sup>1</sup> *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 39 Ch.D. 339.

<sup>2</sup> *Ridgway v. Hungerford Market* (1835), 3 A. & E. 171.

<sup>3</sup> *Price v. Mouat* (1862), 11 C.B. (N.S.) 508.



time, (b) that on the occasion in question it was reasonable to give the order to work overtime, (c) that specific rates of pay were agreed for such a contingency, he should have no difficulty in securing judgment.

#### WAGES PAYABLE ON SUMMARY DISMISSAL

The position as to wages payable, when a servant is properly dismissed on the spot, is the same as when he himself wrongfully terminates his contract without notice. In neither case can the servant claim the proportion of the week's or month's wages worked, *since nothing is earned at all until the agreed period is completed.*

The following case is useful as illustrating this principle when applied to a weekly service of so many hours. A painter was hired by the week, his wages to be 7d. per hour, payable every Saturday at noon. The full week consisted of fifty-four and a-half hours, concluding at 5.30 on Friday, and overtime was paid for at the same rate. A week's notice from either party was required to terminate the service.

In the course of a week the master had occasion to complain of the painter's work and the latter took offence and refused to finish the job in hand, and left at midday on Friday without giving any notice. He was held to have forfeited his wages for the current week.<sup>1</sup>

The whole of this case proceeds upon the footing that the painter was a weekly servant. The result would be different in the case of a factory worker on piece-work paid weekly, the wages being then payable as earned; or in the case of a daily hiring<sup>2</sup> paid weekly, the worker then being entitled to his wages for each completed day.

A similar question arises in relation to compositors or other skilled hands who are paid e.g. £6 per week of forty-five hours. The employer being short of work puts them on short time without obtaining their consent; what is his legal liability on the first pay-day? Is it the weekly wage, or is he entitled *strictly* to reckon up the wages on an hourly basis?

Ordinarily, no doubt, the workman is willing to accept the latter basis rather than risk receiving notice. Strictly speaking, so long as he is ready and willing to work the forty-five hours he is entitled to be paid his £6 and no less, until the contract is terminated by a proper notice, and a fresh one substituted.

#### RIGHTS OF A MANAGER

Precisely the same principle applies in the case of the summary dismissal of a managing director. In one case an officer of this standing in a company had been dismissed for transmitting false and misleading accounts. The contract was for fifteen years at a salary of £2,500 per annum, payable monthly. It does not appear clearly from the report

<sup>1</sup> *Saunders v. Whittle* (1876), 33 L.T. 816.

<sup>2</sup> *Warburton v. Hepworth* (1880), 6 Q.B.D. 1.

whether there was any provision for termination by notice in the ordinary way. Mr. Justice Avory held upon the facts that this contract was divisible, and that the salary became due and the right to it was vested at the end of each month. The managing director being dismissed on 22nd October, had no claim after the end of September.<sup>1</sup>

#### THE UNDERLYING PRINCIPLE

Mr. Justice McCardie a year later expounded the point in a thorough and illuminating manner. 'It is desirable,' he said, 'to consider the meaning of the words "wrongfully dismiss". The phrase has often been used but never defined. Does it indicate a peculiar contractual feature of the relationship between the master and the servant, or does it denote a mere application to such relationship of the well-known principles of law as to the repudiation of contracts?'

After discussing the cases, the learned judge finds in substance, that *continued good conduct by the servant is a condition, either express or implied, of the contract of service. This being an essential obligation of the contract, the master is entitled, when that obligation has been broken, to treat the contract as at an end, but not otherwise.*

It follows that actions for 'wrongful dismissal' merely illustrate the legal rule that where a party (whether master or servant) has unjustifiably repudiated the contract he is liable in damages; and that such party, after repudiating by misconduct or otherwise, cannot thereafter set up the contract and claim what would otherwise be due under it.<sup>2</sup>

This explanation of the fundamental principle makes it abundantly clear that whether a servant leaves in the middle of a period of employment without a word, or whether he is summarily dismissed for good cause, in each case there is a breach of contract by the servant, by reason of which he forfeits whatever part of his remuneration has not yet accrued due (subject, of course, to the comments above on daily servants paid weekly).

#### MASTER'S CLAIM FOR DAMAGES

But the consequences to the servant of an unlawful repudiation of a contract go further than forfeiture of wages; the master has an action for damages.

In a 1918 case a blouse machinist was summoned in a Police Court under the Employers & Workmen Act, 1875, for leaving without notice. The girl was employed at 35s. a week, though she herself contended that her wages were 5s. 10d. daily. Wages were paid on Saturdays for the week ending on the Friday night previous. The machinist worked for a week and on the Saturday in addition, and drew her wages, but failed to appear on the Monday morning.

<sup>1</sup> *Healey v. Société Anonyme Française Rubastic*, [1917] 1 K.B. 946.

<sup>2</sup> *In re Rubel Bronze & Metal Co.*, [1918] 1 K.B. 315.

Nothing had been said on either side as to notice; the employers claimed as damages 35s., less 5s. 10d. for the Saturday's work. It was contended on their behalf that it was an implied term of the contract of service that it should not be terminable without a week's notice, and that the plaintiffs were entitled to damages. The magistrate found there was no such term and dismissed the complaint.

On appeal to a Divisional Court of the King's Bench Division it was held that the case must be remitted for the magistrate to consider first whether it was a weekly or daily hiring. If it were the latter the machinist would only be bound to give a day's notice, and the damages would be reduced accordingly. Reasonable notice must be given in each case according to the facts as found in evidence.<sup>1</sup>

Where an action lies, such damages may be claimed as are the reasonable consequences of the breach of contract, and may thus be calculated on the footing of the extra wages paid to a servant hired upon the emergency, to replace the servant who has wrongfully absented himself. If on the other hand nothing extra is paid and additional labour is available at once, the employer may find it difficult to prove that he has sustained any damages at all.

#### DAMAGES FOR WRONGFUL DISMISSAL

Considering now the servant's right of action, it is to be noticed that up to a certain point it is analogous to the master's. As in the case of the blouse machinist last cited, the measure of damages in the servant's action is the amount that would have been earned during the period of notice. This sum may consist of wages and commissions, and even in a proper case of such tips as the servant had been prevented from receiving.<sup>2</sup>

If, however, the servant obtains fresh employment immediately upon the wrongful dismissal and loses nothing by the exchange he has suffered nothing, and is entitled only to nominal damages. In every case he is bound to do his best to get fresh employment as soon as possible so as to reduce the loss.<sup>3</sup>

In an important House of Lords decision some years ago it was decided by a majority of the Law Lords that damages are to be confined to the loss which can be calculated and proved. So where a servant is wrongfully dismissed from his employment, the Court is not to allow anything for the servant's injured feelings or for the manner of his dismissal, nor even for the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment.<sup>4</sup>

<sup>1</sup> *Payzu Ltd. v. Hannaford*, [1918] 2 K.B. 348.

<sup>2</sup> *Manubens v. Leon*, [1919] 1 K.B. 208.

<sup>3</sup> *Reid v. Explosives Co.* (1887), 19 Q.B.D. 264 C.A.

<sup>4</sup> *Addis v. Gramophone Co.*, [1909] A.C. 486.

**MEMBERSHIP OF SOCIETY**

Under the Shop Clubs Act, 1902, it is an offence punishable by a fine of £5 to stipulate with a workman that he shall discontinue his membership, or not become a member of any friendly society other than a shop club, or join an unregistered shop club.

By the Trade Disputes and Trade Unions Act, 1927, local or other public authorities were not to stipulate with their servants that they should or should not be members of trades unions; and such authorities were not to stipulate with their contractors to the same effect, but that Act was completely revoked by the Trade Disputes and Trade Unions Act, 1946.

## CHAPTER FORTY-TWO

### MASTER AND SERVANT (*contd.*)

#### RESTRAINT OF TRADE AND APPRENTICESHIP

##### (1) RESTRAINT OF TRADE

It is an old principle of the Common Law that any agreement which a person makes, and which restrains him in the exercise of his particular trade or calling, is contrary to public policy, and is therefore void. Thus not infrequently where it is a condition in an agreement of service, that the servant shall not on completion of his term of employment set up in the same business on his own account in the same town, the Courts refuse to enforce the condition.

This doctrine which has been enormously modified in recent years is the outcome of a conflict of two principles – the freedom of contract and the freedom of trade.

The modern view is that such covenants *should* be enforced provided the person in whose favour they are made does not reserve more than a reasonable protection for his own interest.<sup>1</sup>

Thus where a publisher agreed not to publish in future a magazine of a particular description, and then at a later date broke his agreement, it was pleaded on his behalf that the covenant was void for 'restraint of trade'; but when the point came to be decided it was held that such an undertaking was very similar to an agreement by a tradesman not to sell particular wares, and that it was by no means void on the grounds claimed.<sup>2</sup>

The application of the principle in contracts of service entered into by persons under employment is exemplified by the following recently reported cases. In the first, an employee of a co-operative society of farmers' merchants had undertaken that whenever he left his present master, he would not enter any concern of the same nature within twenty-five miles, for a period of ten years, and further that he would not solicit any of the customers of the said business. The covenant was held to be unnecessarily wide, especially the latter part, because it applied to persons who might become customers after the defendant's service with the society was determined. The whole agreement was said to be bad in consequence, the judge refusing to uphold part and condemn part.<sup>3</sup>

In another case the defendant was employed in a hairdressing business in Southsea, and remained in the same service for seven years,

<sup>1</sup> *Maxim Nordenfelt Co. v. Nordenfelt*, [1893] 1 Ch. 630; [1894] A.C. 535.

<sup>2</sup> *Ainsworth v. Bentley* (1866), 14 W.R. 630.

<sup>3</sup> *East Essex Farmers Ltd. v. Holder*, [1926] W.N. 230.

learning all the branches of the business, and becoming personally known to the customers. Her contract contained a clause prohibiting her during a period of two years from the termination of her service from being engaged in any similar business within the county borough. She left the plaintiff, and became an assistant to a competitor 100 yards away. It was held that the covenant was not unduly wide and an injunction was granted.<sup>1</sup>

Where there is a covenant between the parties that upon termination of the contract the servant shall not for a fixed number of years carry on a similar business within a particular area, the effect of a wrongful dismissal is exceedingly important.

Here, if the servant likes, he may say that when he was summarily and wrongfully dismissed, his master put an end to the contract by breaking an essential obligation, and it is then competent for that servant to say, 'I take you at your word; the agreement shall be put an end to *altogether*, I retaining my rights to sue you for the breach.'

The restrictive covenant then falls to the ground completely and the servant is no longer bound by it, though he retains his action against the employer for wages accrued due and for damages in lieu of wages for the period of notice.<sup>2</sup>

### *Injunctions*

Although restrictive covenants are commonly enforceable unless they are wider than is necessary for the protection of the master's interests, the Court will not grant an injunction which would in effect order *specific performance of an agreement of personal service*.

Thus a reporter may be engaged by a daily paper for a fixed period with a stipulation that during that period he will not report for any other *daily* paper. Such a condition is negative and any breach will be restrained by injunction.

But if the condition is that for the term of a fixed number of years he will enter *no other employment*, such a condition is too wide; it is negative in form but not in substance, and enforcement would in certain circumstances prevent the reporter from earning a livelihood at all, and in consequence no injunction would be granted.<sup>3</sup>

### *Breach of Trust*

*Apart from some restrictive covenant* of the kind outlined above, there is nothing illegal in a servant's trying to secure a share of his late master's connection, after the termination of his services, nor even in recommending himself to his master's customers before he leaves the service with a view to opening up business on his own account.<sup>4</sup>

<sup>1</sup> *Beck v. Cluett*, [1926] June 26th, *Law Journal*.

<sup>2</sup> *General Bill Posting Co. v. Atkinson*, [1908] 1 Ch. 537; [1909] A.C. 118.

<sup>3</sup> *Rely-a-Bell Alarm Co. v. Eisler*, [1926] Ch. 609.

<sup>4</sup> *Nichol v. Martyn* (1779), 2 Esp. 732.

But if a servant does more than this, and provides himself with a list of his master's customers copied from his books with a view to inducing them to trade with him, the master is entitled to an injunction to prevent him from using the fruits of this breach of trust, and to damages.<sup>1</sup>

The position is the same where the servant abuses his employment and seeks to undermine his master's business by preparing copies of the designs and details of his master's work for his own purposes.<sup>2</sup>

### *Servants' Characters*

Upon the termination of service a master is under no obligation to give his servant a character, and is under no legal liability for refusing so to do.<sup>3</sup>

If, however, he does give the character and the document is libellous the servant *may* have an action against his master. The position is that if the statement is true, no action lies, however defamatory the matter; while if it is untrue the master's principal defence will usually be one of 'privilege', for every document produced in the 'common interest' of the sender and of the receiver, is privileged. The system whereby masters give each other the characters of servants they have employed is clearly for mutual protection, and therefore in the common interest of the new employer and of the old.

The defence of privilege is and remains good unless and until the servant can prove 'express malice' in reply. Such express malice may not infrequently be inferred from the circumstances in which the statement was made, or, of course, where it can be established that the master was fully aware that the statement was untrue.

## (2) APPRENTICESHIP

The apprenticeship system is still of sufficient importance in the trade to merit a few observations. The essential feature of a contract of apprenticeship as distinct from a contract of service, is the master's covenant to teach his trade to the apprentice, either with or without a payment of wages or provision of board and lodging.

### *The Surety*

As the apprentice is ordinarily a minor and, therefore, legally incapable of contracting, a surety is necessary to guarantee the fulfilment of his part of the engagement. The deed of apprenticeship often provides for a fixed sum to be forfeited by the surety in the event of the apprentice leaving his master before the expiration of the term, or other breach of covenant.

<sup>1</sup> *Robb v. Green*, [1895] 2 Q.B. 315 C.A.

<sup>2</sup> *Merryweather v. Moore*, [1892] 2 Ch. 518.

<sup>3</sup> *Carroll v. Bird* (1800), 3 Esp. 201.

If there is no provision fixing the amount to be forfeited, the surety is liable to be sued for damages sustained by the master by reason of the apprentice's breach of contract; the master can, however, only recover in respect of the loss he has suffered *up to the date of the action*, and not for prospective loss.<sup>1</sup>

### *Indentures*

Although a contract of apprenticeship is usually embodied in a deed, this is not a legal necessity; but the rule under the Statute of Frauds which requires written evidence of contracts which are not intended to be performed within a year, applies here and makes a documentary contract of some kind essential.<sup>2</sup>

An infant apprentice may not be bound without his consent and he should sign the contract, but there is nothing to prevent him from binding himself even without the consent of his parents. Such an agreement is binding upon the infant only *if it is for his benefit*, and he can repudiate it if he can show the contrary. When the apprentice becomes of age it is open to him to put an end to the contract within a reasonable time if he wishes, without giving any reason for his act. The surety remains liable in either case.

### *Employers and Workmen Act, 1875*

This Statute to which reference has previously been made<sup>3</sup> gives a special jurisdiction to magistrates in respect of contracts of apprenticeship. Under the Statute the Court may order the apprentice to perform his duties, and may require any person liable for his good conduct to find security in a sum not exceeding £10. Apart from this Act, no action can be brought against the infant *personally* on his covenant to serve his master for the agreed term.

In serious cases of breach of an apprenticeship deed, whether by master or by apprentice, proceedings should be taken in the County Court with its jurisdiction up to £100, as the Police Courts cannot award larger damages than £10. In such proceedings the infant will sue 'by his next friend'; if the master is taking action he will ordinarily sue the surety only, unless the apprentice is of age.

### *Rights of Action*

In contracts of apprenticeship the obligations of the parties to the contract are *independent*, and not *interdependent*. Thus, where a master has attempted to dismiss his apprentice and is sued in consequence, it is no defence to say that the apprentice was unwilling to learn or misconducted himself.

<sup>1</sup> *Lewis v. Peachey* (1862), 1 H. & C. 518.

<sup>2</sup> See page 3.

<sup>3</sup> See page 223.



Unless the contract expressly reserves to the master a right to dismiss the apprentice for misconduct, his only remedy is to sue the surety for damages caused by the apprentice's breach of contract. The master must remain ready and willing to teach until the contract is at an end.

The surety is not liable for trivial acts of misconduct, but only for gross and serious breaches of duty. Even where an apprentice had robbed his master, it has been held that the latter could not dismiss him;<sup>1</sup> but where the apprentice was guilty of habitual criminal conduct, or where the behaviour of a surgeon's apprentice in dispensing medicines constituted a real danger to his master's practice, the master was entitled to regard the contract as at an end.<sup>2</sup>

### *Illness*

The effect of illness on a contract of apprenticeship is the same as in other contracts of service, except that the Court leans more strongly in favour of the apprentice. No temporary or even recurring illness justifies a master in dismissing his apprentice, or in requiring him to serve an additional term to balance his absences; but where the disease is so serious or of such a kind that the apprentice is entirely unable to carry out his part of the contract, then the contract may become impossible of performance and the master is released from his obligations.

### *London Apprenticeships*

There is a special jurisdiction in respect of apprenticeships to Freemen of the City of London; it is exercised in the Mayor of London's Court and in the Chamberlain's Court.

By immemorial custom the indentures should be enrolled by the master at the Chamberlain's Court within the first year of the term. The apprentice must be between the ages of 14 and 21 at the date of binding, and the apprenticeship must be *for not less than four continuous years*, or the indenture will be void.<sup>3</sup>

There is little doubt that at the time of writing there are many cases in the City where indentures of apprenticeship to a Freeman have been signed on a *three years' basis* which could be set aside by either party as being void for the reason indicated.

<sup>1</sup> *Phillips v. Clift* (1859), 4 H. & N. 168.

<sup>2</sup> *Waterman v. Fryer*, [1922] 1 K.B. 499; *Wise v. Wilson* (1845), 1 Car. & Kir. 662.

<sup>3</sup> Act of Common Council, 14th March, 1889.

## CHAPTER FORTY-THREE

### MASTER AND SERVANT (*contd.*)

#### EDITORS AND REPORTERS

##### EMPLOYMENT OF EDITORS

DIFFICULTIES have at times arisen from the fact that where a man has capably performed an editor's duties for a considerable time, his power and influence have become completely disproportionate to his legal position, as the servant of the proprietor. The law recognises nothing special, however, in an editor's authority and position; and the most that can be said is that undue interference with an editor in the performance of his duties may amount to a breach of contract.<sup>1</sup>

The case in which this was said dates back as far as 1860 when the editor of a periodical known as the *Photographic News* sued for an injunction against the proprietors, to restrain them from interfering with him in his editorial capacity, and from omitting his name from the title of the publication.

The bone of contention between the parties was (according to the editor's case) that the proprietors had required him to insert in the journal notices or articles about photographic instruments, and works connected with photography, which were not fair criticisms, but were in fact puffing advertisements, and the plaintiff had refused to write them. Following this, the proprietors, who were not in the position to terminate the employment except in the case of a clear breach of duty, took the alternative course of largely reducing the editor's control, and of omitting his name from the publication.

On the question of control the Master of the Rolls said in his judgment: 'It appears to me that it would lead to a great amount of difficulty if the owners of a copyright in a journal were bound to insert everything which the editor thought fit. Everyone would admit that they would not be bound to insert any libellous matter. How is the Court to draw the line and determine how far the owners of the copyright may interfere with the discretion of the editor?'

And he sums up the possible remedies thus: 'If the defendants unduly interfere with the functions of the editor, or if he improperly introduces matter which is injurious to the journal, the best course is to have it settled by an action at law, and leave it to a jury to determine the amount of the damages' – but no injunction will be given. And similarly, in the matter of excluding the editor's name as a part of the title or elsewhere, it was held that the claim could not be supported in the absence of any express agreement.

<sup>1</sup> *Crookes v. Petter* (1860), 3 L.T. 225.

## AN AGENT OF THE PROPRIETOR

From the last case it will be clear that of itself an editor's position confers no particular authority, and that everything depends upon the terms of employment in each individual case. Generally speaking, whether the editor is making a contract with contributors, or whether he is selecting matter offered for publication, he is deemed to be acting as the agent of the proprietor, and not as a principal.

The proprietor can thus be made answerable for any wrongful acts on the part of the editor if it can be said that such acts arise out of the terms of his authority, or are within the scope of his employment.<sup>1</sup> Conversely, the editor can claim the agent's right of indemnification in respect of losses arising out of the service which he renders to his principal.

But on this point a clear distinction must be made in respect of illegal acts. Here the editor is just as responsible as the proprietors, and if proceeded against, either alone, or together with his principals, he formerly could not claim from them either contribution or indemnity. Similarly, the innocent proprietor could not recover damages from his own editor for inserting illegal matter without his knowledge.<sup>2</sup> The law formerly was that there was no right of contribution between joint wrongdoers, but the position was amended by the Law Reform (Married Women and Joint Tortfeasors) Act, 1945.<sup>3</sup>

## PROPRIETOR'S RIGHT TO DEFEND EDITOR

While it is abundantly clear that the editor can have no legal right to demand protection in respect of the consequences of a libel there is no doubt that if, as a matter of ordinary business, the proprietor likes to undertake the defence, there is nothing to prevent him from so doing.

The point arose in an interesting way some time ago in connection with the Royal British Nurses Association, and a newspaper known as the *Nurses Journal*. Here a certain doctor who was president of the association brought an action to recover damages for an alleged libel, published in a report of a meeting of the association at St. Bartholomew's Hospital, and chose to sue only the lady who was honorary editor, and not the association which was generally responsible.<sup>4</sup>

The executive committee passed a resolution authorising their solicitors to defend the action on behalf of the lady editor, and this was approved by a large majority of the general council. One dissentient member, however, brought an action to restrain the association from so expending its funds, on the general grounds that it could not be

<sup>1</sup> *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716.

<sup>2</sup> *Smith v. Clinton*, [1909] 99 L.T. 840.

<sup>3</sup> See page 85, *ante*.

<sup>4</sup> *Breay v. Royal British Nurses Association*, [1897] 2 Ch. 272.

within the powers of a society incorporated for purposes connected with nursing voluntarily to undertake the defence of an action for libel.

Lord Justice Chitty decided with great respect that this contention, which was put forward on behalf of the dissentient member by Mr. Swinfen Eady (as he then was), was an absurd proposition, and that as a matter of ordinary business the funds of the association could be lawfully employed in thus defending its own agent.

#### PRIVILEGES OF THE PRESS

Reporters have certain statutory rights as representatives of the press which it is convenient to deal with at this point. Curiously enough, both the Acts which together form their 'Charter of Liabilities' were placed on the Statute Book in 1908.

The Local Authorities (Admission of the Press to Meetings) Act, 1908, provides in Section 1 that representatives of the press shall be admitted to the meetings of every local authority; provided that they may be temporarily excluded if a majority of the meeting resolves that in view of the special nature of the business then being dealt with such exclusion is desirable.

The expression 'local authority' means in addition to County Councils, Borough, Urban and Rural Councils, Parish Meetings, Boards of Guardians, Water Boards and any other local body which may have the power to impose a rate.

The expression 'representatives of the press' means duly accredited representatives of newspapers and news agencies.

This statutory privilege does not extend to *committees* of local authorities, although such committees are at liberty to admit reporters.

The Children Act, 1908, provides in Section 114 that the Court may be cleared when a child or young person is called as a witness in relation to offences against decency and morality. Notwithstanding this, however, the section specifically reserves the right of bona fide newspaper representatives to remain in court.

This reservation was bound to lead to certain difficulties, since if a judge wished to reduce publicity in an unsavoury case, and cleared the Court for this purpose, his object was likely to be frustrated by the remaining in Court of the press representatives. Such a difficulty in fact arose and was fought out in the highest tribunal, in the case of *Scott v. Scott* in 1913.<sup>1</sup>

The whole question of what justified an order for a hearing *in camera* was considered in the course of that litigation, and it was finally decided that in any case such an order extends *only to the hearing*, and does not prohibit the subsequent publication of what passed, provided that such publication be made in good faith and without malice.

<sup>1</sup> *Scott v. Scott*, [1913] A.C. 417.

## OFFICERS OF LIMITED COMPANIES

Under the rules of the Supreme Court if a party to a cause is a joint-stock company, any opposite party may apply for an order allowing him to deliver interrogatories (or lists of questions which must be answered on oath, so that the other side may obtain necessary admissions), to 'any member or officer of such company'. On this point it has been decided that neither the editor nor the chief reporter of a newspaper owned by a limited company is a 'member or officer of the company' within the meaning of the rule.<sup>1</sup>

## JUDICIAL PROCEEDINGS ACT, 1926

This measure, the Judicial Proceedings (Regulation of Reports) Act, 1926, has had some effect in revolutionising a certain part of the newspaper world. A short résumé is as follows:

It shall not be lawful to print or publish (or cause or procure such printing, &c.)

- (a) In relation to *any* judicial proceedings, any indecent matter or details, the publication of which would be calculated to injure public morals.
- (b) In relation to judicial proceedings *for dissolution or nullity* of marriage, judicial separations, &c., any particulars other than the following:
  - (i) The names, addresses and descriptions of the parties and witnesses.
  - (ii) A concise statement of the charges and countercharges.
  - (iii) Any submissions and decisions on points of law.
  - (iv) The summing up, findings and judgment.

The maximum penalty provided is four months' imprisonment with or without the addition of a fine of not more than £500.

It was felt in committee that reporters might very well find their position intolerable under these drastic regulations; and it was therefore provided that no person other than a proprietor, editor, master printer or publisher should be liable to be convicted under the Act.

A further assurance against irresponsible attack exists in the provision that no prosecution is to be initiated without the sanction of the Attorney-General.

It is interesting to notice that the scope of the measure is not limited to newspapers and magazines, and therefore the prohibited 'publication' may conceivably be extended to correspondence, and certainly to foreign editions of English papers. Accounts of foreign trials also come within the Act. But law reports and medical works are specifically excluded.

<sup>1</sup> *Murray v. Northern Whig Ltd.*, [1912] 46 I.L.T. 77.

At a very late stage a suggestion was made that a clause should be added with a view to putting a stop to the publication of articles containing the experiences of convicted criminals. There can be no two opinions as to the eminent desirability of doing away with this most objectionable form of sensational journalism. Owing, however, to the fact that the object of the Bill was defined as 'the regulation of press reports of judicial proceedings', it was decided that this much-needed reform could not be incorporated into it.

#### RIGHT TO NOM DE PLUME

In certain cases where a journalist has for years contributed to a newspaper under a certain name so that such contributions have become a 'feature', a serious question may arise upon the termination of his employment.

It was decided in a 1908 case<sup>1</sup> that in these circumstances the journalist has a right, as against the proprietor, to continue to use the name for his own purposes.

<sup>1</sup> *Lanada v. Greenberg*, [1908] 24 T.L.R. 441.

## CHAPTER FORTY-FOUR

### FACTORIES

#### REGULATIONS AFFECTING EMPLOYERS

**THE** Factories Act, 1937, superseding the Act of 1901, which was the ruling Statute when the first edition of this book was issued, imposed more onerous obligations on factory occupiers towards giving to employees a greater measure of health, safety and welfare than had been compulsory since 1901. The need for a revised Statute was not disputed by employers in general and the new Act could be said to bring working conditions up to the level of the general practice observed in the more modern and well-run factories, rather than to impose harsh conditions for which there was no precedent.

The 1937 Act should be referred to for its terms in detail on any point of difficulty arising but the notes in the following pages are sufficiently full to serve as a guide to all its requirements. A number of Statutory Orders have followed upon the Act and these are dealt with either in this chapter or in the Appendix. The law as embodied in the 1901 Act was repealed, but a few Statutory Orders in force before 1937 still have effect and these are referred to in the Appendix.<sup>1</sup>

The Act applies to all factories ('premises in which . . . persons are employed in manual labour . . .') including 'premises in which printing by letterpress, lithography, photogravure or other similar process, or book-binding is carried on by way of trade or for purposes of gain or incidentally to another business so carried on'. This, it will be noted, includes the premises of commercial houses who do their own printing, whether by printing plant or by rotaprint, multilith, multigraph and similar machines.

Although most of the previous law has been repealed, a Statute prohibiting night work by young persons and one making the two-shift system possible are both still in force. The two-shift system is subject, as regards the hours of women and young persons, to any limitations attached to the permission given to any factory occupier to work on that system.

Throughout the 1937 Act there are references to functions of the Secretary of State. All such functions were, by the Transfer of Functions (Factories, &c., Acts) Order, 1946, transferred to the Minister of Labour and National Service.<sup>2</sup>

The following are short references to the Sections of the 1937 Act, in their numerical order, which in any substantial degree affect printers and newspaper proprietors.

<sup>1</sup> The Factories Act, 1948, made some amendments.

<sup>2</sup> S.R. & O. 1946 No. 376.

## PART I

### HEALTH (GENERAL PROVISIONS)

(1) *Cleanliness.* Every factory must be kept in a clean state and free from effluvia arising from any drain, sanitary convenience or nuisance. Accumulations of dirt and refuse are to be removed daily from the floors and benches and workrooms and from stairs and passages. Floors of workrooms are to be cleaned at least once a week by washing, or, if effective and suitable, by sweeping or other method. There are also provisions as to periodic washing of inside walls, partitions and ceilings, though this does not apply (except where the district inspector of factories otherwise requires) to any factory where mechanical power is not used and less than ten persons are employed; or to storage rooms in which no process is regularly carried on. S.R. & O. 1938 No. 487 provides that the requirements as to inside walls, &c., shall not apply to (a) certain factories and parts of factories specified, including (i) rooms used for storage of articles in which no process is regularly carried on and (ii) parts of walls, partitions, ceilings or tops of rooms which are at least twenty feet above the floor, except in the case of workrooms in which the amount of cubic space allowed for every person employed in the room is less than 500 cubic feet; (b) certain other factories specified, including 'foundries other than foundries in which brass founding is carried on', except in the case of workrooms in which the amount of cubic space allowed for every person employed in the room is less than 2,500 cubic feet.

This S.R. & O. also states that where whitewashing or colour washing is required by the Act this shall not apply to walls, partitions, sides, ceilings or tops which have been painted with at least two coats of a washable water paint (as defined) and which are repainted with at least one coat of such paint at least once in every three years and are washed at least once in every fourteen months. Particulars of the name, &c., of the paint used are to be entered in the general register.

(2) *Overcrowding.* The minimum cubic space allowed per person employed at any one time in a workroom is 400 cubic feet, excluding space more than 14 feet from the floor and treating galleries as separate rooms. The number of persons who may be employed in each workroom must be posted in the room unless the inspector otherwise allows.

(3) *Temperature.* Effective provision must be made for securing and maintaining a reasonable temperature in each workroom but no method may be employed which results in the escape into the air of any workroom of any fume of such a character and to such an extent as to be likely to be injurious or offensive to persons employed therein. Where a substantial proportion of the work is done sitting and does not involve serious physical effort, the temperature must not, after the



first hour, be less than sixty degrees while work is going on. At least one thermometer is to be provided and maintained in a suitable position.

(4) *Ventilation.* Effective and suitable provision must be made for adequate ventilation by circulation of fresh air and for rendering harmless, so far as practicable, all fumes, dust and other impurities injurious to health generated in the course of any work.

(5) *Lighting.* The requirements as to lighting are important for printers; no previous statute dealt with lighting, though there had been some special regulations. The Act requires that 'effective provision shall be made for securing and maintaining sufficient and suitable lighting whether natural or artificial in every part of a factory in which persons are working or passing'. The Secretary of State was empowered to prescribe standards of lighting and a special committee was appointed to advise on the whole subject. The committee issued its report and this contained certain recommendations of principles for securing good lighting. In February, 1939, the Home Secretary stated in the House of Commons that, as the next step in getting these principles translated into practice, a leaflet was being issued to factory occupiers summarising the recommendations and urging them to have the lighting arrangements in their factories reviewed with reference to these principles. The intention of the Home Secretary was to issue draft regulations on the subject as soon as employers had had reasonable time to go into the matter. No regulations have yet been issued, and the delay is doubtless due to the political situation in 1939 and since, but it is to be expected that regulations on the lines of the committee's recommendations will be issued as soon as practicable. The minimum standards recommended for general lighting were not at all high. As regards lighting for specific purposes no recommendation was made, as the committee saw many difficulties involved and they proposed to investigate the matter further. As regards general lighting, the recommendations dealt with the suppression of glare, the avoidance of extraneous shadow and the prohibition of unsuitable light sources. The recommendations of general lighting power for 'working areas' were a minimum of 1.0 foot candle at floor level, 0.5 foot candle for interior passages and access, and 0.1 foot candle for exterior employment, passages and access.

Windows and skylights are required by the Act to be kept clean and free from obstruction except where shaded to mitigate heat or glare.

(7) *Sanitary conveniences.* 'Sufficient and suitable sanitary conveniences' for the persons employed in the factory shall be provided, maintained and kept clean, and effective provision shall be made for lighting the conveniences. The standard prescribed is stated in the Sanitary Accommodation Regulations, 1935, No. 611. (See Appendix.)

(8) *Enforcement by District Councils.* Provisions of Part I relating to sanitary conveniences and any regulations made thereunder shall be enforced by the district council. The provisions relating to cleanliness, overcrowding, temperature, ventilation and drainage of floors shall, in respect of any factory where mechanical power is not used, be enforced by the district council.

(9) *Powers of Inspector* as to sanitary defects remediable by district council.

(10) *Powers of Secretary of State* and Inspector in case of default of a district council.

(11) *Medical supervision.* Where it appears to the Secretary of State that in any factory or class or description of factory (a) cases of illness have occurred which he has reason to believe may be due to the nature of a process or other conditions of work; or (b) there may be risk of injury to health from any process or any substance used; or (c) that young persons are or are about to be employed in work which may cause injury to their health; he may make special regulations for medical supervision of the persons, or any class of persons, employed at that factory or class or description of factory, or may exercise his powers by order in the case of a particular factory. No regulations or orders have been made under this section that would apply to any printing factory.

## PART II

### SAFETY (GENERAL PROVISIONS)

*General Note as to intention to fence machinery.*—Before the synopsis of the sections of the Act is continued under this head of 'Safety', it seems desirable to point out that the factory occupier's bona fide intention to remedy the unfenced condition of his machinery or plant is no answer to any prosecution brought against him.

This is illustrated in a case where a man was employed to oil certain dangerous machinery on which, at the commencement of his employment, the proper fence existed. Subsequently, however, the fence was broken and the workman complained to the manager. The latter undertook in the proprietor's hearing to carry out the necessary repairs, but before they were able to be carried out the man was injured. The proprietor was held responsible.<sup>1</sup>

As to what amount or kind of fencing is sufficient, it has been decided that the criterion is not whether the machinery is fenced in the ordinary manner which is regarded as sufficient in the best regulated mills in the district, but whether the fencing is according to the best known method at the time.<sup>2</sup>

<sup>1</sup> *Clarke v. Holmes*, [1862] 7 H. & N. 937.

<sup>2</sup> *Schofield v. Schunck*, [1855] 24 L.T. (O.S.) 253.

(a) Every flywheel directly connected to any prime mover and every moving part of any prime mover except such as are mentioned in subsection (c) of this section, shall be securely fenced. (b) The head and tail race of every water wheel and of every water turbine shall be securely fenced. (c) Every part of electric generators, motors and rotary converters, and every flywheel directly connected thereto, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced.

(13) *Transmission Machinery.* Every part of transmission machinery must be securely fenced unless safe by reason of position or construction as in the case of prime movers (Section (12)). Devices or appliances must be provided in every room or place where work is carried on that will promptly cut off the power from transmission machinery therein. Driving belts when not in use must not be allowed to ride or rest upon revolving shafts of transmission machinery. Striking gear or other efficient mechanical appliances must be provided and used to move driving belts to and from fast and loose pulleys which form part of the transmission machinery and must be so constructed, placed and maintained as to prevent the driving belt from creeping back on to the fast pulley. The provisions as to stopping appliances, driving belts and striking gear may in special circumstances not be enforced if the Secretary of State is satisfied that the fulfilment of these requirements is unnecessary or impracticable.

'Transmission machinery' is defined as meaning 'every shaft, wheel, drum, pulley, system of fast and loose pulleys, coupling, clutch, driving belt or other device by which the motion of a prime mover is transmitted to or received by any machinery or appliance'.

(14) *Other machinery.* Dangerous parts of machinery other than prime movers and transmission machinery must be securely fenced unless safe by reason of position or construction as in the case of prime movers (Section (12)). Where by reason of the nature of the operation safety cannot be secured by a fixed guard it will be sufficient if a device is provided to automatically prevent the operator from coming into contact with the dangerous part. Where a device is available for preventing exposure of a dangerous part while in motion or stopping a machine forthwith in case of danger, the Secretary of State, by regulations, may require the use of that device, but in the event of proceedings for contravention it will be a sufficient defence to prove that a device at least equally effective was being used in connection with the machinery in respect of which the contravention occurred.

(15) *Unfenced machinery.* In determining whether any part of machinery is safe by reason of position or construction, as mentioned in Sections (12), (13) and (14): (a) no account is to be taken of any person carrying

out, while the part of machinery is in motion, an examination thereof or any lubrication or adjustment shown by such examination to be immediately necessary if it is necessary to carry it out while the part of machinery is in motion; and (b) in the case of any part of transmission machinery used in any such process as may be specified in regulations made by the Secretary of State, being a process where owing to the continuous nature thereof the stopping of that part would seriously interfere with the carrying on of the process, no account shall be taken of any person carrying out, by such methods and in such circumstances as may be specified in the regulations, any lubrication or any mounting or shipping of belts. Provided that this section shall only apply where the examination, lubrication or other operation is carried out by such men aged eighteen or over as may be specified in regulations and all such other conditions as may be so specified are complied with.

(16) *Maintenance of fencing.* All fencing or other safeguards are to be kept in position while the safeguarded parts are in motion or in use except where any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary.

Regulations under Sections (15) and (16) were issued in 1938 along with the Prescribed Leaflet therein referred to. These are printed in Appendix, pages 279-280, along with a note on a recent case under Sections (15) and (16).

(17) *Construction and sale of new machinery.* In this section a penalty is, for the first time, attached to selling or letting on hire for use in a factory in the United Kingdom any machine (made after 29th July, 1937) intended to be driven by mechanical power which does not comply with certain requirements. The requirements are that every set-screw, bolt or key on any revolving shaft, spindle, wheel or pinion shall be so sunk, encased or otherwise effectively guarded as to prevent danger, and that all spur or other toothed or friction gearing which does not require frequent adjustment while in motion shall be completely encased unless it is so situated as to be as safe as if it were encased. This section does not relieve the occupier of a factory from his obligation to fence dangerous parts of machinery after its installation.

(18) *Vessels containing dangerous liquids.* Every fixed vessel of which the edge is less than three feet above the adjoining ground or platform must, if it contains any scalding or corrosive liquid, either be securely covered or securely fenced to at least that height, or where by reason of the nature of the work this is not practicable, all practicable steps must be taken by covering, fencing or other means to prevent any person from falling in. This would apply to metal pots.

(19) *Self-acting machines.* No traversing part of any self-acting machine, and no material carried thereon, shall be allowed on its outward or

inward traverse to run within eighteen inches of any fixed structure other than a part of the machine. This applies only if the space over which it runs is a space over which any person is likely to pass. The provision affects factories erected since 1895 and factories or parts reconstructed after 30th July, 1937, as well as all extensions or additions after 30th July, 1937.

(20) *Cleaning of machinery by women and young persons.* They must not clean any part of a prime mover or of any transmission machinery while either is in motion, nor any part of a machine if doing so would expose them to risk of injury from a moving part of that machinery or any adjacent machinery.

(21) *Training of young persons working at dangerous machines.* Young persons must not work at dangerous machines (as to be prescribed by the Secretary of State) unless instructed as to dangers arising and precautions to be observed and unless they have received a sufficient training in work at the machine or are under adequate supervision. S.R. & O. 1938 No. 485 prescribes the following among others as dangerous machines for the purpose of this section, viz.: (1) power presses other than hydraulic presses; (2) guillotine machines; and (3) platen printing machines.

(22) *Hoists and lifts.* Very comprehensive provisions are contained in this section requiring sound mechanical construction; examination by a competent person once every six months (a report to be entered in or attached to the general register) and enclosure of the hoist-way or lift-way and fitting of the openings into the hoist-way or lift-way with efficient gates. On all hoists or lifts these gates must be of the interlocking type, but in the case of old hoists or lifts constructed or reconstructed before the passing of the Act, where it is not reasonably practicable to fit such devices, other arrangements may be permitted. The maximum safe working load must be marked on a hoist or lift, and it must not be overloaded. Additional provisions are made for hoists and lifts used for carrying persons, whether with or without goods. These devices are required to prevent the cage over-running; the cage must be fitted with interlocking gates subject to the proviso mentioned above with regard to old hoists or lifts, and in the case of a hoist or lift constructed or reconstructed after the passing of the Act there must (if the platform or cage is suspended by rope or chain) be at least two chains or ropes with independent attachment for the suspension of the platform or cage, and other efficient devices to guard against breakages of the ropes or chains.

Some exemptions from these provisions are allowed in the case of continuous hoists and of hoists or lifts not operated by mechanical power. The Secretary of State is also given power to except certain classes or descriptions of hoists or lifts where he is satisfied that enforcement of any of the provisions would be unreasonable, and certain

exemptions were made by the Hoists Exemption Order, 1938 (S.R. & O. 1938 No. 489) and the Hoists Exemption (Amendment) Order, 1946 (S.R. & O. 1946 No. 1947).

(23) *Chains, ropes and lifting tackle.* These, whether used for raising or lowering persons, goods, or materials, must be of good construction, sound material, adequate strength and free from patent defect. A table showing the safe working loads of every kind and size of chain, rope or lifting tackle in use must be posted in the store where these are kept and in prominent positions on the premises (excepting, in the case of lifting tackle, when the load is marked on it). All chains, ropes and lifting tackle in use must be thoroughly examined by a competent person at least once in every six months or such longer period as may be prescribed. None of these items are to be taken into use for the first time in any factory unless tested and thoroughly examined by a competent person and a certificate given and kept available for inspection.

Chains and lifting tackle other than (a) rope slings, (b) any class exempted by certificate of the Chief Inspector on grounds mentioned, must be annealed periodically. In the case of chains and lifting tackle not in regular use the annealing must be done when necessary. If in regular use, chains and slings of half-inch bar or smaller must be annealed every six months, and other chains and tackle every fourteen months.

A register containing the prescribed particulars must be kept with respect to all chains, ropes and lifting tackle except fibre rope slings. S.R. & O. 1938 No. 599 prescribed the particulars that are to be kept in the register.

(24) *Cranes and other lifting machines.* All parts and working gear of lifting machines must be of good construction, sound material, adequate strength and free from patent defect and must be thoroughly examined by a competent person every fourteen months, the particulars of the examination to be entered in a register. Details of the required particulars are prescribed in S.R. & O. 1938 No. 600.

Safe working loads must be indicated as stated. No lifting machine is to be taken into use for the first time in any factory unless it has been tested by a competent person and a certificate given as to the safe working load.

(25) *Floors, passages and stairs – Construction.* Floors, steps, stairs, passages and gangways are to be of sound construction and properly maintained. Staircases must have substantial handrails – one on each side if the staircase is open or specially liable to cause accidents, and in other cases one handrail on the open side. Every open side of a staircase must also be guarded by a lower rail or other effective means. Openings in floors must be securely fenced except where the nature of the work renders this impracticable.

(26) *Safe means of access.* So far as reasonably practicable safe means of access must be provided to every place at which any person has to work, and where there is liability of a person falling more than ten feet fencing or other means must be provided for ensuring safety unless the place affords secure foothold and, where necessary, secure handhold.

A recent case under this section was *Callaghan v. Kidd & Son Ltd.* ([1944] K.B. 460). A workman had tripped over some iron bars lying on the floor close to where he was working and in trying to save himself he suffered injury from a revolving grindstone. The bars had been brought by another worker to be ground. It was held that this section imposed a direct obligation on the employer to maintain the safety of the access to work as a positive and continuing duty.

(27) *Dangerous fumes – precautions.* Where work has to be done inside any chamber, tank, pit or similar confined space certain safety precautions are specified as necessary if dangerous fumes are liable to be present that would involve risk of persons being overcome. The Chief Inspector may grant exemption from the requirements if he thinks compliance is unnecessary or impracticable.

(28) *Explosive or inflammable dust, gas or vapour – precautions.* This section contains certain safety requirements as to opening-up of plant containing explosive or inflammable gas, &c., under pressure, also as to welding, &c., of plant containing explosive or inflammable substance.

(29) *Steam boilers.* The existing law as to steam boilers has been extended and strengthened by this section. The definition of steam boiler now includes an economiser and a super-heater and these are required to be thoroughly examined by competent persons at least once every fourteen months in the same way as steam boilers and after extensive repairs. A new steam boiler must not be taken into use until a certificate of test has been obtained either from the manufacturer or from a boiler inspecting company or association, and a second-hand boiler must not be taken into use for the first time in a factory until it has been examined and reported upon.

(30) *Steam receivers and steam containers.* This section contains new provisions requiring that every steam receiver not so constructed and maintained as to withstand the maximum permissible working pressure of the boiler or other source of steam supply, shall be fitted with a suitable reducing valve, safety valve, steam pressure gauge and stop valve. Every steam receiver and its fittings must be properly maintained and be thoroughly examined by a competent person, so far as the construction of the receiver permits, at least once in every period of twenty-six months. A report of the result of every such examination containing the prescribed particulars (including particulars of the safe working pressure) must be entered in or attached to the general register.

(31) *Air receivers.* There are detailed requirements as to construction of air receivers and as to their inspection. 'Air receiver' means (a) any vessel (other than a pipe or coil, or any accessory, fitting or part of a compressor) for containing compressed air and connected with an air-compressing plant; (b) any fixed vessel for containing compressed air or compressed exhaust gases and used for the purpose of starting an internal combustion engine; (c) any fixed or portable vessel (not being part of a spraying pistol) used for the purpose of spraying by means of compressed air any paint, varnish, lacquer, or similar material, and (d) any vessel in which oil is stored and from which it is forced by compressed air. Receivers and their fittings must be of sound construction and properly maintained and safe working pressure must be marked on them so as to be plainly visible. Receivers connected with an air compressing plant must either be so constructed so as to withstand safely the maximum pressure which can be obtained in the compressor, or be fitted with a suitable reducing valve or other suitable appliance to prevent the safe working pressure of the receiver being exceeded. Safety valves and pressure gauges are required, also a suitable appliance for draining the receiver – except in the case of vessels used for spraying paint, &c., by means of compressed air and vessels used for storing oil from which it is forced by compressed air. A receiver must also have a suitable manhole, handhole, or other means to allow the interior to be thoroughly cleaned. Thorough cleaning is to take place every twenty-six months and there must be thorough examination by a competent person every twenty-six months except in the case of receivers of solid-drawn construction when the period is longer. A report of each examination and test is to be entered in the general register.

(32) *Exceptions as to steam boilers, steam containers, and air receivers.* The Chief Factory Inspector is given power by certificate to exempt any of these items of plant from any of the provisions above referred to if he is satisfied that the provisions cannot be reasonably applied. On representations by the British Federation of Master Printers, the Chief Inspector in 1939 made certain exceptions in relation to the air receiver used in connection with the 'Monotype' machine. On further representation by the Federation in 1947 the 'Monotype' air receiver was entirely exempted from the requirements of Section 31.

(33) *Water-sealed gas-holders – precautions.* This section contains some detailed requirements as to capacity, construction, &c., of water-sealed gas-holders.

(34) *Means of escape in case of fire.* Every factory to which this section applies must be certified by the District Council (in London, the London County Council) as being provided with such means of escape in case of fire for the persons employed therein as may reasonably be



required in the circumstances of each case, and if, after the grant of a certificate, it is proposed to make any material extension or material structural alteration of the factory premises, or to increase materially the number of persons employed in the factory or in any part specified in the certificate, the occupier must give notice to the council in writing, and the council may require alterations to be made. The section applies to every factory (a) in which more than twenty persons are employed; or (b) which is being constructed or converted for use as a factory, in which more than ten persons are employed on any floor above the ground floor; or (c) constructed before the passing of the Act, and in which more than ten persons are employed above the first floor or more than twenty feet above ground level.

(35) *Regulations and by-laws for means of escape in case of fire.* Regulations may be made as to the means of escape in case of fire, and it is to be the duty of the District Council (as defined in the Act) to see that the regulations are complied with. District Councils may make by-laws as to means of escape to be provided, but these must not be inconsistent with regulations made under this section.

(36) *Safety provisions in case of fire.* Doors of factories and doors of rooms and doors affording exit for workers from any building or enclosure in which the factory is situated must not, while any person is within a factory or room for employment or meals, be locked or fastened so as to prevent them being easily and immediately opened from inside. Certain doors specified must also open outwards; hoistways and liftways inside a building constructed after 1st July, 1938, must be completely enclosed with fire-resisting materials and have doors of the same, and the top of the hoistway or liftway is to be enclosed only by material easily broken by fire or provided with a vent. Exceptions may be made in certain circumstances.

Windows, doors, and other exits affording means of escape in case of fire or giving access to means of escape – other than means of exit in ordinary use – must be distinctly and conspicuously marked by a notice printed in red letters of adequate size. Effective provision must be made for giving warning in case of fire, which shall be clearly audible throughout the building if more than twenty persons are employed there. Another point to observe is that the contents of rooms where persons are employed must be so arranged or disposed as to allow free passage-way to allow means of escape.

(37) *Instruction as to use of means of escape.* Effective steps are to be taken to ensure that all persons employed are familiar with the means of escape and the use of these, also the routine to be followed in case of fire. This applies to factories where there are more than twenty persons employed in the same building above first-floor level or more than twenty feet above the ground level.

(38) *Power to make special safety arrangements.* The Secretary of State may, in view of the number and nature of accidents occurring in any factory or class of factory, make special regulations requiring provision of special safety arrangements.

(39 and 40) These sections give power to a court of summary jurisdiction to make orders as to dangerous conditions or practices or a dangerous factory.

### PART III

#### WELFARE (GENERAL PROVISIONS)

(41) *Supply of drinking water.* There must be provided and maintained at suitable points conveniently accessible to all persons employed, an adequate supply of wholesome drinking water from a public main or from some other source of supply approved in writing by the District Council (as defined under Sections 152 and 156). If the supply of water is not laid on it is to be contained in suitable drinking vessels and renewed at least daily. The supply, in such cases as the district inspector may direct, is to be clearly marked 'drinking water'. Except where the water is delivered in an upward jet conveniently for drinking, one or more suitable cups or drinking vessels must be provided at each point of supply with facilities for rinsing them in drinking water.

(42) *Washing facilities.* Adequate and suitable facilities for washing are to be provided, including soap and clean towels or other suitable means of cleaning or drying, and the facilities must be conveniently accessible and be kept in a clean and orderly condition. The Secretary of State may provide for exemption from any of the requirements if he considers their application would be unreasonable on account of difficulty of obtaining an adequate supply of water, or other special circumstances. (A factory regulation of the year 1921, No. 1443, is still in force, requiring the provision of specified lavatory accommodation where the manipulation of leads is carried on.)

(43) *Accommodation for clothing.* For clothing of employees not worn during working hours there must be adequate and suitable accommodation provided, and such arrangements as are reasonably practicable for drying such clothing must be made. A standard may be laid down for the accommodation and drying arrangements, but no indication has been given that any room must be set aside for the purpose. Exemption may be allowed in special circumstances.

(44) *Facilities for sitting.* For the use of female workers whose work is done standing, there must be provided 'suitable facilities for sitting sufficient to enable them to take advantage of any opportunities for resting that may occur in the course of their employment'. It is understood that what the Factories Department will require as compliance with this section is an 'occasional chair or a collapsible seat beside the working place'. This section was amended by Factories Act, 1948, Section 6.

(45) *First aid.* For each 150, or fraction of 150, persons employed, a first-aid box or cupboard must be provided which must be readily accessible, and it must contain nothing except first-aid appliances or requisites. The person in charge of it must always be readily available during working hours and where more than fifty persons are employed, must be a person trained in first-aid treatment. A notice is to be affixed in every workroom stating the name of the person in charge of the first-aid box or cupboard in respect of that room.

If an ambulance room is provided there may be exemption from this section.

S.R. & O. 1938 No. 486 prescribes standards of contents of first-aid boxes or cupboards for factories where the number of persons employed (a) does not exceed ten, (b) exceeds ten but does not exceed fifty, and (c) exceeds fifty.

(46) *Welfare regulations.* Special regulations may be made on welfare matters including those dealt with in Sections 41 to 45 if the Home Secretary considers such are required on account of conditions and circumstances of employment or the nature of the processes carried on. Canteens were brought within the scope of the welfare regulations by S.R. & O. 1948 No. 707.

#### PART IV

##### HEALTH, SAFETY AND WELFARE (SPECIAL PROVISIONS AND REGULATIONS)

(47) *Removal of dust or fumes.* Where, in connection with any process carried on, there is given off any dust or fume or other impurity likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, then all practicable measures must be taken to protect persons employed against inhalation of these and to prevent the dust, &c., accumulating in the room. Exhaust appliances must be provided, where the nature of the process makes it practicable as near as possible to the point of origin of the dust, &c., so as to prevent it entering the air of any workroom.

No stationary internal combustion engine may be used unless provision is made for conducting its exhaust gases into the open air and it is partitioned off to prevent injurious fumes entering a workroom.

(48) *Meals in dangerous trades.* Where in any room lead or other poisonous substance is so used as to give rise to any dust or fume, no person is to be permitted to take food or drink in the room or remain in it during the meal or rest intervals or breaks. Suitable provision is to be made for enabling persons employed in any such room to take their meals elsewhere in the factory. The Secretary of State is authorised to make a similar prohibition as regards rooms where the nature of any process would make it injurious to health, or otherwise undesirable, to take meals in those rooms or remain therein during intervals.

(49) *Protection of eyes.* The Secretary of State is authorised in the case of any particular processes involving special risk of injury to the eyes from particles or fragments thrown off in the course of the process to require suitable goggles or effective screens to be provided as a protection. This section was applied by S.R. & O. 1938 No. 654 to certain processes including dry grinding of metals, or cutting of metals by means of an electrical, oxy-acetylene or similar process.

(50 to 52). These sections do not apply to printing or kindred trades.

(53) *Underground rooms.* An 'underground room' is defined as meaning 'any room which, or any part of which, is so situate that half or more than half the whole height thereof, measured from the floor to the ceiling, is below the surface of the footway of the adjoining street or of the ground adjoining or nearest to the room'. No work may be carried on in such a room (other than a room used only for storage or for a purpose specially excepted by order of the Secretary of State) if the District Factory Inspector certifies that the room is unsuitable for work as regards construction, height, light or ventilation, or on any hygienic ground, or on the ground that adequate means of escape in case of fire are not provided.

The effect of a certificate may be suspended by the inspector for a period to enable the occupier to make the room suitable or obtain other premises. A certificate may be withdrawn by the inspector if such alterations are made as in his opinion render the room suitable.

Where such a room, at the commencement of the Act, does not form part of a factory, or is not used as a workroom in a factory, or is used only for storage or for a purpose specially excepted by order, no work may be carried on in it until notice has been given to the District Factory Inspector giving certain particulars. The form of notice is prescribed by the Work in Underground Rooms (Form of Notice) Order, 1946.<sup>1</sup>

There is possibility of appeal, within twenty-one days, against a decision of an inspector.

(54 and 55). These sections do not apply to printing or kindred trades.

(56) *Lifting excessive weights.* A young person must not be employed to lift, carry, or move any load so heavy as to be likely to cause injury to him. Special regulations may be made prescribing maximum weights, but no such regulations have been made.

(57 and 58). These sections do not apply to printing or kindred trades.

(59) *Lead processes involving use of lead compound.* Women or young persons are not to be employed in any process involving the use of lead compounds if the process is such that dust or fume from a lead compound is produced or the persons therein are liable to be splashed with any lead compound in the course of their employment, unless certain provisions are complied with. These provisions include (a) means for drawing away the dust or fume from the persons employed

<sup>1</sup> S.R. & O. 1946 No. 2247.

by an efficient exhaust draught; (b) medical examination at prescribed intervals; (c) no food, drink, or tobacco to be brought in or consumed in any room where the process is carried on; (d) suitable protective clothing to be provided; (e) suitable cloakroom and washing accommodation to be provided; and (f) the keeping of the rooms and all apparatus in a clean state.

(60). This section gives power to the Secretary of State to make special regulations for safety and health. Under this section the Electricity (Factories Act) Special Regulations, 1944, were passed in relation to safety precautions required in connection with the use of electrical energy in factories.

(61 to 63). These sections do not apply to printing or kindred trades.

## PART V

### NOTIFICATION AND INVESTIGATION OF ACCIDENTS AND INDUSTRIAL DISEASES

(64) *Notification of accidents.* Where any accident occurs in a factory which either causes loss of life to a person employed in the factory or disables any such person for more than three days from earning full wages at the work at which he was employed, written notice in the prescribed form must be sent to the inspector for the district.

Where disablement has been notified and death ensues, notice of the death must be given by the occupier of the factory as soon as the death comes to his knowledge.

Where the occupier of the factory is not the actual employer, the latter must report the accident to the occupier.

(65) *Notice of dangerous occurrences.* The Secretary of State may, if he considers that by reason of the risk of serious bodily injury to persons employed, it is expedient that notice should be given under Section 64 of dangerous occurrences such as explosion, fire, accidents to machinery or plant, &c., extend the provisions of that section to such occurrence whether death or disablement is caused or not. Such extension is effected by the Dangerous Occurrences (Notification) Regulations, 1947.<sup>1</sup>

(66) *Notification of industrial diseases.* Every medical practitioner attending on or called in to visit a patient whom he believes to be suffering from, *inter alia*, lead poisoning contracted in a factory, is required to advise the Chief Inspector of Factories and the occupier of the factory is required to send written notice of every case of lead poisoning forthwith to the inspector for the district and to the examining surgeon in the prescribed form. The requirements of the Act in regard to notification of accidents by the occupier of the factory apply to cases of industrial disease such as lead poisoning.

(67) *Inquest in case of death by accident or industrial disease.* This section states the procedure to be followed where a coroner holds an inquest in case of death by accident or industrial disease.

<sup>1</sup> S.R. & O. 1947 No. 31.

(68) *Investigation of accidents and cases of disease.* The Secretary of State may, where he considers it expedient, direct investigation to be held into any accident occurring or case of disease contracted or suspected to have been contracted in a factory. Detailed procedure is laid down.

(69) *Duties of examining surgeon.* A duty is placed upon an examining surgeon to investigate and report on causes of death or injury or on cases of disease of which he receives notice, and for this purpose he is given the same powers as an inspector.

## PART VI

### EMPLOYMENT OF WOMEN AND YOUNG PERSONS

#### (a) *Hours and holidays*

(70, 73, 82, 83 and 84) *Hours of employment and overtime hours.* A 'young person' means one who has attained the age of fourteen and has not attained the age of eighteen. 'Woman' means a woman who has reached eighteen.

The total hours worked, exclusive of intervals allowed for meals and rest, must not exceed nine in any day or forty-eight in any week.

The period of employment of women and young persons is to be between seven in the morning and eight in the evening (six o'clock in the evening in the case of young persons under sixteen), on week-days other than Saturdays, or one o'clock on Saturdays, and the actual starting hour will be taken in reckoning the period of employment. They must not be employed continuously for a spell of more than four and a half hours without an interval of at least half an hour for a meal or rest, but if an interval of not less than ten minutes is allowed in the course of a spell, the spell may be increased to five hours.

Section 70, subsection (d) provides that the period of employment and intervals allowed for meals and rest under that section shall be the same for all women and young persons employed in the factory, except that the period of employment may end at an earlier hour for young persons under sixteen. Exceptions are provided by the Factories (Separation for Certain Purposes) Regulations, 1939.<sup>1</sup>

Section 70 also prohibits the employment of a woman or young person during any meal or rest interval.

The following Tables A, B and C do not appear in the Act but are given here as showing in convenient form the effect of the two Sections 70 and 73. Table A shows the daily and weekly maximum normal hours that may be worked by women and young persons (i.e. excluding overtime and meal and rest intervals and special exceptions), also the normal periods of employment (i.e. inclusive of the time allowed for meals and rest).

<sup>1</sup> See Appendix, page 281.

**TABLE A**  
(Hours of employment exclusive of Overtime)

Category of Worker	6-day Week Factories					5-day Week Factories			
	Daily Period of Employment (inclusive of meals and rest)		Maximum Hours of Work			Daily Period of Employment (inclusive of meals and rest)		Maximum Hours of Work	
	*Starting and Finishing Hours	Maximum Spread-over	Daily Limit	Weekly Limit		*Starting and Finishing Hours	Maximum Spread-over	Daily Limit	Weekly Limit
Women (18 and over)	Mon. to Fri. 7 a.m.-8 p.m. Sat., 7-1	Daily, Mon. to Fri., 11 hrs. Sat., 6 hrs.†	9	48‡		Mon. to Fri. same as for 6-day Factories	Daily 12 hrs.	10§	48
Young Persons: 16 to 18	Mon to Fri., 7 a.m.-8 p.m. Sat., 7-1	Do.	9	48		Do.	12 hrs.	10§	48
14 to 16	Mon. to Fri., 7 a.m.-6 p.m. Sat., 7-1	Do.	9	48‡		Do.	12 hrs.	10	44

\* The earliest starting hour may be fixed not earlier than 6 a.m. if the Home Secretary is satisfied that the exigencies of trade or convenience of workers so require.

† 7 hours if a 6 a.m. start is authorised.

‡ It will be noted that the maximum weekly hours allowed by the Act are more than are actually worked in printing factories by agreement.

§ This may be increased by overtime to 10½.

#### NOTE AS REGARDS STAGGERING OF HOURS.

To facilitate the spreading of the electricity load by means of staggered hours in factories, provision was made in 1947 to enable District Inspectors of Factories to authorise various adjustments of the provisions of the Factories Act governing the times of employment of women and of young persons under sixteen. This was done by two Statutory Orders, the Factories (Hours of Employment in Factories using Electricity) Order, S.R. & O. 1947 Nos. 1870 and 2341.

**TABLE B**  
(Hours of Employment - Overtime)

Category of Worker	Maximum Overtime Weeks and Hours				
	Hours per Week	Max. No. of Weeks per Year	Hours per Calendar Year		
			(a) If calculated relative to factory or to part of factory or to a set of persons in a separate process	* (b) If calculated relative to individual worker	(c) Factories where there is seasonal or other special pressure and Regulations are issued by Home Secretary to meet this
Women .. .. .	6	25	100	75	150
Young Persons 16-18 ..				50	100

\* On the Home Secretary allowing this option to any class of factory where he is satisfied that calculation relative to the whole factory would be unreasonable or inappropriate as respects a substantial number of factories in such class.

TABLE C  
(Maximum Hours of Work (including Overtime, &c.))

Category of Worker	Starting and Finishing Hours**	6-day Week Factories		5-day Week Factories	
		Maximum Spread-over	Daily Limit	Maximum Spread-over	Daily Limit
Women (18 and over)	Mon. to Fri.: 7 a.m. to 9 p.m. Sat.: 7 to 1	12† Sat. 6‡	10†	12†	10† Sat. 4½§
Young Persons: 16 to 18	Mon. to Fri.: 7 a.m. to 8 p.m. Sat. 7 to 1	12 Sat. 6‡	10	12	10† Sat. 4½§
14 to 16*	Mon. to Fri.: 7 a.m. to 6 p.m. Sat.: 7 to 1	11 Sat. 6‡	9	12	10

\* Not permitted to work overtime.

† This may, by regulations, be increased in a maximum of 8 weeks in the year to meet special pressure.

‡ 7 hours if a 6 a.m. start is authorised.

§ But no overtime must be worked on any other day that week.

\*\* The earliest starting hour may be fixed not earlier than 6 a.m. if the Home Secretary is satisfied that the exigencies of trade so require.

Any period of overtime less than half an hour is reckoned as half an hour, and any period between half an hour and one hour is reckoned as one hour.

The six hours per week and the twenty-five weeks per annum may be increased as follows:<sup>1</sup>

(1) where overtime is calculated by factory (or parts of factory or sets of workers)<sup>2</sup> –

- (i) by regulations for any class or description of factory if the Home Secretary is satisfied of the necessity for the increase owing to exigencies of the trade;
- (ii) by Order for any class or description of factory if the Secretary of State is satisfied of the necessity owing to unforeseen pressure of work due to sudden orders or owing to breakdown or other unforeseen emergency;

(2) where overtime is calculated by individual workers<sup>3</sup> – by regulations for any class or description of factory if the Secretary of State is satisfied that the nature of the business carried on involves overtime employment of different persons on different occasions to such an extent that the limitation by reference to the factory would, as respects a substantial number of factories of that class or description, be unreasonable or inappropriate, such regulations to include provisions that no woman shall work more than seventy-five hours, and no young person more than fifty hours, in any calendar year, also that no woman or young person shall, 'except as other-

<sup>1</sup> See Table 'B'.

<sup>2</sup> Section 73, subsection (7).

<sup>3</sup> Section 73, subsection (9).



wise provided in regulations' work overtime for more than six hours in any week or in more than twenty-five weeks in any calendar year.

(71) *Reduction of weekly hours of young persons under sixteen.* The hours worked by young persons under sixteen exclusive of intervals for meals and rest are by this section not to exceed forty-four, but with power to the Secretary of State if he is satisfied after inquiry held, on certain matters, to increase the hours that may be worked by such young persons up to forty-eight. Two periods of increase to forty-five hours were allowed to the printing industry under this power, but the maximum has now reverted to forty-four hours.

S.R. & O. 1940 No. 139 directs that as respects factories in which the number of hours permitted to be worked in any week by young persons under sixteen is less than forty-eight, Part VI of the Act is to be modified to the effect that (1) the periods of employment for such young persons need not be the same as for other young persons and women employed in the factory; and (2) the period of employment for young persons under sixteen is to be the same for all such young persons employed in the factory; provided that different periods of employment may be fixed for different sets of such young persons subject to conditions stated in the Order.

(72) *Notice fixing hours of employment.* A notice must be posted in the prescribed form in the factory specifying (a) the period of employment for each day of the week for the women and young persons employed in the factory, and (b) the intervals allowed them for meals and rest, and, subject to overtime provisions and any special exceptions allowed, they must not be employed otherwise than in accordance with the notice. Different periods of employment and different intervals may be fixed for different days of the week. A change must not be made oftener than once in three months, unless for special cause allowed in writing by the inspector for the district. Notice of any change must be served on the inspector and posted in the factory.

(73) *Conditions of overtime.* Section 73 attaches the following conditions to the working of overtime by women and young persons over sixteen as shown in Table C:

The total hours worked – including overtime, but excluding meal and rest intervals – are not to exceed the following limits:

(a) six-day-week factories, ten hours per day;

(b) five-day-week factories, ten and a-half hours per day;

but the Secretary of State can, by regulations, increase this daily limit of ten hours in up to eight weeks in the year, in the case of women over eighteen (or women over eighteen employed in any

specified process), in any class or description of factory which is subject to seasonal or other special pressure. No overtime is permitted for young persons under sixteen.

For the purposes of Section 73 the employment of persons in different parts of a factory or the employment of different sets of persons in different processes may, subject to regulations, be treated, for the purpose of reckoning hours of overtime employment or the number of weeks in which overtime employment can take place, as if it were employment in different factories.<sup>1</sup> S.R. & O. 1938 No. 640 prescribes regulations under subsection (8) here referred to. (See Appendix, page 277.)

(74) *Notice of overtime.* Before starting any overtime for women or young persons notice is to be sent in writing to the district inspector and particulars are to be entered in the Overtime Register, including particulars of any interval for a meal or rest. Particulars of the overtime are also to be kept posted as may be prescribed.

(75) *Employment inside and outside factory.* During intervals for meals or rest, or any time not included in the period of employment (as fixed by the posted notice) no women or young person can be employed by the occupier of the factory on the factory business or any other business carried on by him. This applies only on any day when the woman or young person is employed in the factory. They may, however, be employed in a shop (except young persons under sixteen) outside the period of employment if the shop is reckoned as factory employment for the purposes of the hours and overtime, &c., provisions.

(76) *Use of rooms during intervals.* No woman or young person may during a meal or rest interval allowed to her or him remain in a room where a process is then being carried on. Section 86, however, provides for exception from this in certain cases, and the printing industry appears to be exempted.

(77) *Sunday employment.* Women and young persons must not be employed on Sunday in the factory. If employed in any factory on a weekday, they must not be employed on Sunday about the business of the factory or in any other business of the occupier of the factory.

(78) *Annual holidays.* The Act provides, for women and young persons in factories, whole holidays as follows: In England, Christmas Day, Good Friday, and every Bank Holiday, unless another day is substituted on three weeks' notice posted in the factory; and in Scotland six weekdays fixed by occupier on three weeks' notice posted in the factory. In Scottish burghs two of these holidays are to be fixed by the town council and to be not less than three months apart. At

<sup>1</sup> Section 73, subsection (8).

least half of these whole holidays must be between 15th March and 1st October. There is provision for special exception under Section 90.

(79) *Women holding positions of management.* Provisions of Sections 70 to 78 do not apply to women holding responsible positions of management who are not ordinarily engaged in manual work.

(80) *Suspension of provisions as to hours.* In the event of accident or breakdown of machinery or plant, or other unforeseen emergency, the Secretary of State may suspend, for any factory for a specified time, any of the hours and holidays provisions.

(b) *Special Exceptions*

(81) *Exception as to male young persons employed in shifts.* This section does not apply to the printing trades.

(82) *Five-day week houses.* In a factory conducted on the system of employing women and young persons on not more than five days in the week, the total hours worked in any day may be ten and the period of employment may be twelve hours. There may also be a further extension of the hours worked, by overtime, to ten and a-half hours, but not as regards young persons under sixteen. There is also provision for working on a sixth day up to four and a-half hours if no woman or young person has worked overtime on any other day in that week. See table, page 261.

Under power given by Section 151, subsection 8, provision is made for the treatment of different branches of work as different factories, for the purposes of Section 82, by the Factories (Separation for Certain Purposes) Regulations, 1939.<sup>1</sup>

(83) *Exception as to starting time.* The period of employment may, if the exigencies of the trade or the convenience of the workers so require, be allowed to commence earlier than seven o'clock in the morning but not earlier than six. This may be for the whole year or part of a year.

(84) *Simultaneous hours for meals and rest.* Section 70 provides that the period of employment and intervals for meals and rest shall be the same for all women and young persons employed in the factory (except that the period of employment may end earlier for young persons who have reached sixteen). This Section 84 says that subject to such conditions as may be imposed by regulations the provision referred to shall not apply (a) to persons employed in any process on which, by reason of its nature, work requires to be carried on continuously; or (b) to different sets of persons employed on different processes, or sets divided for the purpose of taking meals in a canteen or sets as may be approved by the district inspector. No regulations have been issued applying this section to the printing industry.

<sup>1</sup> See Appendix, page 281.

(85) This section does not apply to the printing industry.

(86) *Exception as to use of rooms during intervals.* This authorises the issue of regulations that the prohibition of the use of rooms during meal or rest intervals shall not apply in certain circumstances. No such regulations have been issued affecting the printing industry.

(87) This does not apply to the printing industry.

(88) *Exception as to male young persons employed on repair work.* Subject to regulations as may be prescribed, the provisions as to hours of employment and overtime employment, use of rooms during intervals, prohibition of Sunday employment, and annual holidays, are not to apply to male young persons employed as part of the regular maintenance staff of a factory, or by a contractor, in repairing any part of the factory or any machinery or plant therein. No notice is required to be served or posted by any occupier availing himself of this exception.

(89) *Exception as to Saturday.* The previous law as to the substitution of another day for Saturday as the short day is continued with slight amendment. Where it is proved to the satisfaction of the Secretary of State that the customs or exigencies of the trade carried on in any class of factories require the substitution, he may authorise it to factories of that class. In the case of (a) newspaper offices, or (b) factories in which the work by reason of its nature requires to be carried on on six full working days in the week, the substitution may be in respect of some of the women and young persons employed therein.

Regulations have been issued<sup>1</sup> under this section allowing newspaper printing offices to substitute some other day for Saturday in respect of some of the women and young persons employed therein and requiring either (1) that the notice under Section 97 shall give the names of the women and young persons in respect of whom the substitution is made; or (2) that the notice shall specify the classes or sets of persons in respect of whom the substitution is made, and, if the Inspector for the District so requires, that there shall be kept posted in the factory, adjacent to the said notice, lists showing the names of the women and young persons in each such class or set. These regulations also authorise the substitution of another day for Saturday in the case of 'factories in which the business is carried on in connection with a retail shop on or immediately adjoining the factory premises'.

(90) *Holidays on different days for different sets.* Where the customs or exigencies of the trade so require, the Secretary of State is authorised to grant a special exception allowing all or any of the annual whole holidays to be on different days for any of the women and young persons employed, or to any sets of these, instead of on the same days.

<sup>1</sup> S.R. & O. 1940 No. 109.

Regulations<sup>1</sup> have been issued under this section allowing special exception to, *inter alia*, (a) factories in which a process is carried on in immediate connection with a retail shop in the occupation of the same occupier, in the same or nearby premises; (b) factories in which is carried on the printing of newspapers or of periodicals or of railway time-tables or of law or parliamentary proceedings or of race or score cards.

(91) *Jewish factories.* Where the occupier is of the Jewish religion or is a member of a religious body regularly observing the Jewish Sabbath, he may employ women and young persons of the Jewish religion or members of such a religious body on Sunday, subject to the condition that the factory must be closed for business on Saturday and must not be open for business on Sunday. In such a case the provisions respecting Saturday are to be taken as referring to Sunday, or, if the occupier so elects, to Friday.

(92 to 95). These do not apply to printing factories.

(96) *Protection of women and young persons employed under exceptions.* Where any special provision appears to be required for protection of the health or welfare of women or young persons employed overtime, or in pursuance of a special exception under the Act, regulations may be issued imposing such special provision.

(97) *Notices, registers, &c., relating to special exceptions.* This section contains provisions as to notice to inspector, posting, and entry in register, of particulars of employment of women and young persons under special exceptions that may be obtained under Sections 82 (five-day week), 83 (earlier start than 7 a.m.), 84 (simultaneous meals and rest), 86 (use of rooms during intervals), 87 (continuous employment of male young persons, with men), 89 (Saturday), 90 (different holidays), and 91 (Jewish factories).

(98) *Regulation of employment of young persons as messengers, &c.* This section applies to young persons employed in collecting, carrying or delivering goods, carrying messages or running errands, being employed in the business of a factory wholly or mainly outside the factory. Their employment must conform to conditions laid down which can be stated shortly as follows:

(a) Total hours worked not to exceed forty-eight in any week;

(b) Continuous employment not to exceed five hours without an interval of at least half an hour for a meal or rest, and where the employment runs from half past eleven in the morning to half past two in the afternoon, an interval of not less than three-quarters of an hour is to be allowed between these hours for dinner;

<sup>1</sup> S.R. & O. 1947 No. 184.

- (c) At least one week day each week (to be notified on Form 15) the young person is not to be employed after one o'clock p.m.;
- (d) If sixteen years of age or over, the young person may work overtime on occasions of seasonal or other special pressure or in cases of emergency, but not more than six hours in any week or fifty in any calendar year with a limitation of overtime to twelve weeks in any calendar year.
- (e) In every period of twenty-four hours between midday and mid-day an interval of at least eleven consecutive hours is to be allowed, and this must include the hours from 10 p.m. till 6 a.m.;
- (f) Particulars of hours and overtime hours are to be recorded (Form 38);
- (g) The reduction of the weekly hours of young persons under sixteen to forty-four (provided by Section 71 of the Act) is to apply to young persons employed in terms of this Section 98.

An employer may give notice to the Inspector for the District that he wishes to substitute the provisions of this Section 98 for the provisions elsewhere in the Act applying to young persons. Form 16 is provided for this notice.

S.R. & O. 1938 No. 533 prescribes that Sections 71 (reduction of weekly hours of young persons under 16), 77 (Sunday employment), 78 (annual holidays), and 91 (Jewish factories) are to apply to the employment of young persons to whom Section 98 applies, subject to adaptations stated in the Order.

The Young Persons (Employment) Act, 1938, contains provisions as to hours of work, &c., similar to those contained in Section 98 of the Factories Act as here referred to, and it should be noted that though it does not apply to young persons whose hours are regulated by the Factories Act, it does apply to 'employment in connection with the business carried on at any premises where a newspaper is published, in carrying messages or running errands'.

(99) *Certificate of fitness of young persons.* A young person under sixteen who is taken into employment in a factory must not remain in that employment after the expiry of such period, not being less than seven days, as may be prescribed unless the examining surgeon has certified him fit for the employment. Statutory Rules and Orders 1938 Nos. 534 and 535, contain provisions as to the manner and place of the examination and the facilities to be provided for it. The fees of the examining surgeon are to be paid by the occupier of the factory (Section 127 of the Act).

(100) *Power of inspector to require certificate.* If the inspector is of opinion that *any young person's* health is prejudiced by employment in

any particular process he may require the employment of that young person to be discontinued. But the examining surgeon may thereafter examine the young person and certify him fit, in which case the inspector's notice falls.

## PARTS VII, VIII AND IX

*Sections 101 to 112.* These do not apply to the printing industries.

## PART X

### MISCELLANEOUS

(113) *Notice of occupation, &c.* Notice of occupation of factory and use of mechanical power, to be served on District Factory Inspector within one month of beginning to occupy or use.<sup>1</sup>

(114) *Posting of Abstract Act, &c.* The following are to be posted at principal entrances to factory at which workers enter, or as inspector may direct:

- (a) Abstract of Act as prescribed;
- (b) Address of District Factory Inspector and Superintending Factory Inspector for the division;
- (c) Name and address of Examining Surgeon;
- (d) Notice of clock, if any, by which periods of employment, &c., are regulated;
- (e) Any other notice required by the Act to be posted.

(115) *Provisions as to special regulations.* Copies of all Special Regulations in force in the factory to be kept posted in the factory in such positions as to be conveniently read by workers. A copy of these to be given by occupier to persons affected by them, if asked for.

(116) *General register.* This is to be kept in the factory or in such place outside it as District Inspector may approve. Extracts must be sent to Inspector as required by him. There shall be entered in or attached to the register:

- (a) The prescribed particulars as to the young persons employed in the factory;
- (b) The prescribed particulars as to the washing, whitewashing or colour washing, painting or varnishing, of the factory;
- (c) The prescribed particulars as to every accident and case of industrial disease occurring in the factory of which notice is required to be sent to an Inspector;
- (d) Particulars showing every special exception of which the occupier of the factory avails himself;

<sup>1</sup> Amended by Factories Act, 1948, Section 5.

(e) All reports and particulars required by any other provision of the Act to be entered in or attached to the register; and

(f) Such other matters as may be prescribed.

There shall be attached to the general register a copy of the certificate of the district council relating to means of escape in the case of fire.

(117) *Preservation of registers and records.* The General Register, and every other register or record kept in pursuance of the Act must be kept available for at least two years, or for such other period as may be prescribed, after the date of the last entry in the register or record.

(118) *Periodical return of persons employed.* This is to be sent, at intervals of not less than one year, to the Chief Inspector.

(119) *Duties of persons employed.* Persons employed must not wilfully interfere with or misuse any means, appliance, or other thing provided under the Act for securing health, safety or welfare, and where such means, &c., are provided for the use of any person under the Act he must use them. An employed person must not wilfully or without reasonable cause do anything likely to endanger himself or others.

(120) *No deduction from wages* to be made by occupier in respect of anything to be done or provided by him under the Act.

(121) *Weights and measures used in ascertaining wages.* Every enactment for the time being in force relating to this subject shall extend to weights, measures and weighing instruments used in a factory for checking or ascertaining wages.

## PART XI

### ADMINISTRATION

(122 to 127) *Duties and powers of Inspectors, clerks, and servants* appointed by Secretary of State, and of examining surgeons. The fees of examining surgeons were specified by S.R. & O. 1938 No. 527, but proposals for raising the scale of these are under consideration (1947).

(128) *Provisions as to County and District Councils.* This gives to Council Officers the same powers of entry, inspection, &c., as factory inspectors.

(129) *Provisions as to regulations and orders of Secretary of State.*

## PART XII

### SUPPLEMENTARY

(130 to 148). These sections deal with offences, penalties and legal proceedings.

*Section 136* provides that where an act or default for which an occupier or owner is liable is actually the act or default of a worker or



other person, such person is liable to a fine as if he were the occupier or the owner.

*Section 137* gives the occupier or owner power to exempt himself from liability on conviction of the actual offender.

## PARTS XIII AND XIV

### APPLICATION OF ACT, INTERPRETATION, ETC.

(149 and 150) *Application* to factories as defined by Act and to factories belonging to the Crown.

(151) *Interpretation of 'factory'*. The expression 'factory' is defined and a list of premises in which persons are employed in manual labour is included within the definition given, whether they fall within the definition or not. The list includes as item (vii) the following description of printing factories:

'any premises in which printing by letterpress, lithography, photo-gravure, or other similar process, or bookbinding, is carried on by way of trade or of purposes of gain or incidentally to another business so carried on'.

It is to be noted that this description of printing factories is much wider than under the previous law. It embraces, by the word 'lithography', premises where 'office-printing' machines such as the 'multilith' and the 'rotaprint' are in use by commercial concerns for their own purposes, as well as 'duplicating' firms who use such machines but are not bona fide printers.

This section also contains the following power in subsection (8):

'Where the Secretary of State by regulations so directs as respects all or any purposes of this Act, different branches or departments of work carried on in the same factory shall be deemed to be different factories.'

Under this power regulations were made by S.R. & O. 1939 No. 1888, a copy of which is printed in the Appendix, page 281.

(152) *General interpretation*. This section defines many of the words or terms used in the Act. It includes 'class or description' in relation to factories, as embracing 'a group of factories described by reference to locality', and 'period of employment' as meaning 'the period (inclusive of the time allowed for meals and rest) within which persons may be employed on any day'.

This section also states that the following workers are not deemed to be employed in a factory for the purposes of the Act, viz. 'any woman, young person or child who works in a factory, whether for wages or not, either in a process or in cleaning any part of the factory used for

any process, or in cleaning or oiling any part of the machinery or plant, or in any other kind of work whatsoever incidental to or connected with the process, or connected with the article made or otherwise the subject of the process', and that 'any woman employed solely in cleaning a factory or any part thereof, otherwise than in cleaning which is incidental to or connected with any process, shall not be deemed for the purposes of Part VI to be employed in the factory'.

(153) *Application of Act to young persons.* A young person who works in a factory, whether for wages or not, in collecting, carrying or delivering goods, carrying messages or running errands shall be deemed to be employed in the factory for the purposes of the Act, but Part VI shall not apply, except as expressly provided, to any such young person who is employed mainly outside the factory.

(154) *Inspection of certain premises.* Where in any premises subject to inspection by or under the authority of a Government department any manual labour is exercised, otherwise than for instruction, in or incidental to the making, altering, repairing, &c., of any article, and the premises do not constitute a factory, the Secretary of State may arrange with the department that the premises shall be inspected for the purposes of the Act.

(155) *Expenses of Secretary of State.*

(156) *Application to Scotland.*

(157) *Certain administrative provisions.* Subsection (1) does not apply to printing industries. Subsection (2) is applicable in London and Scotland only, and imposes penalties for allowing a woman or girl to be employed in a factory within four weeks after childbirth.

(158) This section does not apply to the printing industry.

(159) *Repeal of certain enactments.* Although previous Factory Acts were repealed, any Orders or Regulations under them which were in force at the commencement of the 1937 Act were continued in force by this section. (See below.)

(160) *Short title, &c.* The Act may be cited as the Factories Act, 1937. It came into operation on 1st July, 1938. It does not extend to Northern Ireland except where otherwise expressly provided.

## FACTORY ORDERS PRIOR TO 1937 ACT

Three Orders affecting printers, which were passed under Section 79 of the Factory and Workshop Act, 1901, were, notwithstanding the repeal of that Act, continued in force by the 1937 Act, Section 159. These were in relation to (a) lead smelting, (b) bronzing, and (c) the

manipulation and storage of celluloid, and their provisions are here summarised.

**(A) LEAD SMELTING**

The Order 'For the smelting of materials containing lead' is No. 752 of 1911. It imposes duties on occupiers of factories and on employed persons. Where a lead process is carried on, the floor must be maintained by the occupier in good condition and sprayed with water at least once a day. 'Lead process' means (1) manipulation, movement or other treatment of lead material (as defined) whether by means of any furnace, melting pot, . . . or otherwise, and (2) cleaning or demolition of any furnace, melting pot or other item mentioned. There are also other duties imposed on the occupier in regard to the handling of lead material. For certain work overalls must be provided, and for the use of all persons employed in any 'lead process' there must be lavatory accommodation with warm water, towels, soap and nail brushes. Medical examination is also required and a health register must be kept.

In the case of employed persons there are restrictions in regard to the consumption of food or drink or use of tobacco in any place where a lead process is carried on, and obligations as to washing.

**(B) BRONZING**

An Order, No. 361 of 1912, contains regulations affecting factories or parts thereof in which is carried on the process (referred to as 'bronzing') of applying dry metallic powders to, or dusting them off from, surfaces previously printed or otherwise prepared, in letterpress printing or lithographic printing, or coating of metal sheets. Bronzing by machine must not be done 'except under such conditions as to prevent as far as practicable the escape of dust into the air of any occupied room'. Bronzing by hand (except for the purpose of proof-pulling) must not be done except in connection with an 'efficient exhaust draught' (as defined in the Order), or an appliance so constructed as to prevent as far as practicable the escape of dust into the air of any occupied room.

Other obligations on the factory occupier are for the provision of lavatory accommodation with soap, nail brushes, towels and warm water, and for the provision of overalls for all persons doing bronzing work, with head coverings for females, also the provision of a suitable place for clothing put off during working hours.

Employed persons must wash the face and hands before partaking of food or leaving the premises, and must wear the overalls provided (and head coverings in the case of females).

There must be no food or drink brought into any part of the factory in which bronzing is carried on (other than milk or tea provided by the occupier), nor may tobacco be made use of therein.

It will be noted that there is no obligation on the employer to provide milk or tea though many employers do provide one or other. An obligation to provide milk did formerly exist but was discontinued.

(c) CELLULOID MANIPULATION OR STORAGE

An Order, No. 1825 of 1921, contains regulations applying to all factories in which celluloid or any article wholly or partly made of celluloid is manufactured, manipulated or stored. These regulations are directed against risk of fire. The Chief Inspector of Factories is authorised to exempt, by certificate in writing, any factory by reason of the small quantity in use at any one time or for any other reason.

## APPENDIX I

### THE PRINTER'S IMPRINT

The word 'imprint' is not used in the statute which requires the printer's name and address to be shown on matter he prints, but it is convenient to use it in referring to the statutory requirement. It was the habit in the early days of printing to give an indication of the printer's identity voluntarily, and only at a much later time was it made obligatory.

The statute at present in force on this point is the Newspapers, Printers and Reading Rooms Repeal Act, 1869, which re-enacted part of an Act of 1811 and part of an Act of 1839. The Act of 1839 so far as re-enacted was a part re-enactment with amendment of one passed in 1799. The latest of the three Acts mentioned consists of extracts from the earlier ones as to the imprint and the duty of the printer to preserve copies of what he prints.

The Act of 1799 was passed at a time when seditious literature was being published, and it is intituled 'An Act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices'.

The requirement now existing as to the imprint is stated in the Second Schedule to the 1869 Act, the words used being a re-enactment of Section 2 of the Act of 1839 (2 and 3 Vict. c. 12) which refers back to the Act of 1799:

'Every person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper, if the same shall be printed on one side only or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his or her name and usual place of abode or business, and every person who shall publish or disperse, or assist in publishing or dispersing, any printed paper or book on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall for every copy of such paper so printed by him or her forfeit a sum of not more than five pounds; Provided always, that nothing herein contained shall be construed to impose any penalty upon any person for printing any paper excepted out of the operation of the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, either in the said Act or by any Act made for the amendment thereof.'

Exceptions to the requirement were as stated in short form in chapter thirteen, page 73, and are here given in full as appearing in the Second Schedule of the 1869 Act.

'Nothing in this Act contained shall extend or be construed to extend to any papers printed by the authority and for the use of either House of Parliament.' (39 Geo. III, c. 79, Section 28.)

'Nothing herein contained shall extend to the impression of any engraving, or to the printing by letterpress of the name, or the name and address or business or profession, of any person, and the article in which he deals, or to any papers for the sale of estates or goods by auction or otherwise.' (39 Geo. III, c. 79, Section 31.)

'Nothing in the said Act of the thirty-ninth year of King George the Third, chapter seventy-nine, or in this Act contained, shall extend or be construed to extend to require the name and residence of the printer to be printed upon any bank note, or bank post bill of the Governor and Company of the Bank of England, upon any bill of exchange or promissory note, or upon any bond or other security

for payment of money, or upon any bill of lading, policy of insurance, letter of attorney, deed, or agreement, or upon any transfer or assignment of any public stocks, funds or other securities or upon any transfer or assignment of the stocks of any public corporation or company authorised or sanctioned by Act of Parliament, or upon any dividend warrant of or for any such public or other stocks, funds, or securities, or upon any receipt for money or goods, or upon any proceeding in any court of law or equity, or in any inferior court, warrant, order, or other papers printed by the authority of any public board or public officer in the execution of the duties of their respective offices, notwithstanding the whole or any part of the said several securities, instruments, proceedings, matters and things aforesaid shall have been or shall be printed.' (51 Geo. III, c. 65, Section 3.)

#### IRELAND

It is to be noted that the imprint requirement and the exceptions thereto as quoted above do not apply to Ireland, there being a specific statement to this effect in the Second Schedule to the 1869 Act. Eire has a law of its own which is on similar lines to the British statute though its exceptions are stated differently.<sup>1</sup> Northern Ireland remains free of any imprint requirement.

#### PROSECUTIONS

All printers are doubtless aware of the existence of the legal requirement that they must show their name and address on printed matter they produce, but prosecutions for its omission occur, with remarkable frequency. This must be a matter of common knowledge, yet offences continue for various reasons such as (a) mere carelessness or forgetfulness, (b) a belief that the list of exceptions is much wider than it actually is, this being probably due to the fact that a great deal of printed matter is of a commercial nature not requiring the imprint, (c) objection by a customer to the showing of the imprint which he regards as a free advertisement for the printer and perhaps as a blemish on the appearance of the job, and (d) the desire of the customer, if an advertising agent or a 'farmer' printer, to have his own name shown, to the exclusion of that of the printer. In the last two cases if the printed work does require the imprint, the printer should insist on conforming to the law. In the case of the advertising agent or the 'farmer', the law is not concerned to see their names, though there is no objection in law to these appearing as being concerned in the publication.

Another point to mention is that the Director of Public Prosecutions, who is the official authorised to prosecute, may in practice allow many technical offences to pass if the printed work is of no particular importance and no action in the public interest appears to be called for, but if the character of the work is undesirable in any way, he may prosecute the printer for omission of the imprint even though proceedings against the author or the publisher cannot be justified.

#### TWO QUESTIONS OF DIFFICULTY

Reference has been made on pages 74 and 75 to a joint opinion given by His Honour Brett Cloutman (then Mr. Cloutman) and Mr. Croom-Johnson, K.C. (now Mr. Justice Croom-Johnson), since the first edition of this book was published. The questions were, (1) can a sound case be stated for the view that a printer who has omitted his imprint may, notwithstanding the case of *Bensley v. Bignold* (1822), be entitled to recover his account, and (2) will the imprint of an instructing printer satisfy the imprint requirement?

Counsel compared the wording of the Act of 1799, under which the *Bensley* case was decided, with the wording of the 1869 Act and pointed out various considerations which must have weight on each of the two questions. They mentioned the trade practice of showing an instructing printer's imprint, but on both questions their view was that the law was not beyond doubt and that amendment was desirable.

<sup>1</sup> Offences against the State Act, 1939, published by the Stationery Office, Dublin.

## APPENDIX II

### CERTAIN FACTORY ORDERS SUBSEQUENT TO FACTORIES ACT, 1937, REFERRED TO IN CHAPTER FORTY-FOUR

#### STATUTORY RULES AND ORDERS

1938 No. 611

THE SANITARY ACCOMMODATION REGULATIONS, 1938, DATED 24TH JUNE, 1938, MADE  
BY THE SECRETARY OF STATE UNDER SECTION 7 OF THE FACTORIES ACT, 1937  
(1 EDW. 8 & 1 GEO. 6, c. 67).

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In pursuance of Section 7 of the Factories Act, 1937, and of all other powers enabling me in that behalf I hereby make the following Regulations:

1. These Regulations shall apply to all factories as defined in Section 151 of the said Act and to electrical stations to which subsection (1) of Section 103 of the Act applies.

2. In cases where females are employed there shall be at least one suitable sanitary convenience for every 25 females.

3. In cases where males are employed there shall be at least one suitable sanitary convenience (not being a convenience suitable merely as a urinal) for every 25 males:

Provided that in the case of factories where the number of males employed exceeds 100 and sufficient urinal accommodation is also provided, it shall be sufficient if there is one such convenience as aforesaid for every 25 males up to the first 100, and one for every 40 thereafter.

Provided further that in the case of a factory where the number of males employed exceeds 500, not being a factory constructed, enlarged or converted for use as a factory after the 30th June, 1938, it shall be sufficient to provide one such convenience as aforesaid for every 60 males if sufficient urinal accommodation is also provided and if the Medical Officer of Health issues a certificate (which shall be kept attached to the general register so long as it remains in force) that in his opinion the arrangements at the factory are such that this proviso may properly be applied to the factory. Any such certificate shall be liable at any time to be revoked by the Medical Officer of Health by notice in writing.

4. In calculating the number of conveniences required by these Regulations, any odd number of persons less than 25, or 40, as the case may be, shall be reckoned as 25 or 40.

5. Every sanitary convenience shall be sufficiently ventilated, and shall not communicate with any workroom except through the open air or through an intervening ventilated space:

Provided that in the case of workrooms in use prior to 1st January, 1903, and mechanically ventilated in such manner that air cannot be drawn into the workroom through the sanitary convenience, an intervening ventilated space shall not be required.

6. Every sanitary convenience (other than a convenience suitable merely as a urinal) shall be under cover and so partitioned off as to secure privacy, and shall have a proper door and fastenings. Urinals shall be so placed or so screened as not to be visible from other parts of the factory where persons work or pass.

7. The sanitary conveniences shall be so arranged as to be conveniently accessible to the persons employed at all times while they are at the factory.

8. In cases where persons of both sexes are employed, the sanitary conveniences for each sex shall be so placed or so screened that the interior shall not be visible, even when the door of any convenience is open, from any place where persons of the other sex have to work or pass; and, if the conveniences for one sex adjoin those for the other sex, the approaches shall be separate. The conveniences for each sex shall be indicated by a suitable notice.

9. These Regulations may be cited as the Sanitary Accommodation Regulations, 1938, and shall come into force on the 1st July, 1938, and shall be without prejudice to the requirements in subsection (1) of Section 7 of the Act that the conveniences shall be maintained and kept clean and that effective provision shall be made for lighting the conveniences.

10. As from the 1st July, 1938, the Sanitary Accommodation Order of 4th February, 1903,<sup>1</sup> is hereby revoked.

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## STATUTORY RULES AND ORDERS

1938 No. 640

THE FACTORY OVERTIME (SEPARATION OF DIFFERENT PARTS OR SETS) REGULATIONS, 1938, DATED JUNE 30, 1938, MADE BY THE SECRETARY OF STATE UNDER SECTION 73 (8) OF THE FACTORIES ACT, 1937 (1 EDW. 8 & 1 GEO. 6, c. 67).

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In pursuance of the powers conferred upon me by subsection (8) of Section 73 of the Factories Act, 1937, and of all other powers enabling me in that behalf, I hereby make the following Regulations, prescribing conditions subject to which the employment of persons in different parts of a factory or the employment of different sets of persons in different processes may be treated, for the purpose of reckoning hours of overtime employment or the number of weeks in which overtime employment can take place, as if it were employment in different factories.

1. Where employment in a part of the factory is treated as if it were employment in a different factory—

(a) that part shall consist of a separate room or separate rooms, or be separated from the remainder of the factory by a partition or be distinguished therefrom by a definite line of demarcation, and

(b) no woman or young person who has been employed in overtime in that part shall be employed in overtime in any other part in the same calendar year.

2. Where employment of different sets of persons in different processes is treated as if it were employment in different factories, no woman or young person who has been employed in overtime in one set shall be employed in overtime in any other set in the same calendar year.

3. If the Inspector for the district in writing so directs, the names of the persons employed in each part or set shall be kept posted in the factory in such a position as to be conveniently read by the persons employed in the part or set.

4. For each of the separate parts or sets a separate overtime register shall be kept and separate particulars of overtime shall be reported to the Inspector for the district in accordance with the provisions of subsection (1) of Section 74 of the Act, and a separate notice shall be posted in accordance with the provisions of subsection (2) of the said section. The register, report and notice shall include particulars indicating the part or set to which they relate.

<sup>1</sup> S. R. & O. Rev. 1904, iv, Factory and Workshop, p. 5 (1903 No. 89).



5. The occupier of the factory shall have obtained from the Inspector for the district, and shall hold, a certificate describing the separate parts or sets or processes and certifying that, in the opinion of the Inspector, having regard to all the circumstances of the case, the separation of the parts or sets and the arrangements for securing such separation are satisfactory. So long as the certificate remains in force, employment in the different parts or sets shall continue to be treated for the purposes of subsection (8) of Section 73 of the Act, and of these regulations, as if it were employment in different factories, and there shall be kept posted in the factory, in such characters and in such a position as to be conveniently read by the persons employed, a notice in the form specified in the Schedule to these regulations. Any such certificate as aforesaid may be revoked as from the end of a calendar year on the application of the occupier, or not less than seven days after the Inspector for the district has served upon the occupier a notice in writing that he is no longer satisfied that the separation and arrangements aforesaid are satisfactory.

6. — (i) If any such certificate as aforesaid is granted to take effect as from any date other than the first day of January in any year, then for the purpose of reckoning as respects any part or set for the remainder of the current calendar year the amount of overtime employment permissible, and the number of weeks in which overtime employment can take place, the overtime employment which has taken place in the factory during the part of the calendar year preceding the said date shall be deemed to have taken place in the case of each of the parts or sets.

(ii) Where any such certificate as aforesaid is revoked as from any date other than the first day of January in any year, the amount of permissible overtime employment (if any) allowed for the factory, and the number of weeks (if any) in which overtime employment may take place in the factory, in the remainder of the current calendar year, shall be reckoned as if subsection (8) of Section 73 of the Act had not been adopted in the factory during any part of the year.

7. These Regulations may be cited as the Factory Overtime (Separation of Different Parts or Sets) Regulations, 1938, and shall come into force on the 1st July, 1938.

8. The Order made by the Secretary of State on the 27th March, 1897,<sup>(1)</sup> respecting the separation of branches or departments of work for the purposes of the employment of women during overtime, is hereby revoked.

#### SCHEDULE REFERRED TO

I hereby give notice that, a certificate under the above regulations having been obtained from the District Inspector of Factories and being now in force, employment in the different parts of this factory indicated below (or the employment of different sets of persons in different processes as indicated below), is treated as separate for the purpose of reckoning the amount of overtime permissible under the Factories Act, 1937, or the number of weeks in which overtime employment may take place.

The conditions laid down by the regulations include the following:

A. No woman or young person who has been employed in overtime in one of the separate parts of the factory may be employed in overtime in any other part in the same calendar year.

B. No woman or young person who has been employed in overtime in one of the separate sets may be employed in overtime in any other set in the same calendar year.

(Particulars of parts or sets)

Date.....

Signature of Occupier.....

Insert A or  
B as the  
case may  
require.

<sup>1</sup> S.R. & O. Rev. 1904, iv, Factory and Workshop, p. 86 (1897 No. 226).

STATUTORY RULES AND ORDERS  
1938 No. 641

THE OPERATIONS AT UNFENCED MACHINERY REGULATIONS, 1938, DATED JUNE 30, 1938, MADE BY THE SECRETARY OF STATE UNDER SECTIONS 15 AND 16 OF THE FACTORIES ACT, 1937, (1 EDW. 8 & 1 GEO. 6. C. 67).

In pursuance of the powers conferred upon me by Sections 15 and 16 of the Factories Act, 1937, and of all other powers enabling me in that behalf, I hereby make the following regulations.

*Part I (Regulations 1-7)*

1. Regulations 2 to 7 of these regulations shall apply to the following operations namely—

- (i) the carrying out, in pursuance of paragraph (a) of Section 15 of the Act, of an examination of any part of machinery which is in motion and which is not securely fenced, or any lubrication or adjustment shown by such examination to be immediately necessary, being an examination, lubrication or adjustment which it is necessary to carry out while the part of machinery is in motion, and
- (ii) the carrying out, in pursuance of Section 16 of the Act, of an examination or any lubrication or adjustment shown by such examination to be immediately necessary, when parts of machinery otherwise required to be fenced or safeguarded are in motion or in use but are necessarily exposed for those operations:

Provided that regulations 5 and 6 shall not apply in relation to any part of machinery which is only being moved by hand or by a barring engine or by an inching or similar device, so however that no such operation shall be carried out except by a male person who has attained the age of eighteen.

Provided further that Regulation 5 shall not apply to the setting up of a machine by a toolsetter or other skilled mechanic, being a male person who has attained the age of eighteen and whose duty it is to set up such machine.

2. One or more persons shall be appointed by the occupier of the factory, by signed entry in or by certificate attached to the general register, to be machinery attendants to carry out operations to which this Regulation applies, and any such appointment may be made for all such operations or may be limited to such only of those operations as may be specified in the entry or certificate. The occupier shall furnish to each person so appointed a certificate of his appointment, which certificate shall indicate the limitations (if any) specified as aforesaid.

3. No person shall be appointed to be such a machinery attendant unless he is a male person who has attained the age of eighteen, and has been sufficiently trained for the purposes of the work entailed by those operations which he is authorised by his appointment to carry out, and is acquainted with the dangers from moving machinery arising in connection with such operations.

4. Every such machinery attendant shall be instructed as to the requirements of these Regulations and supplied with a precautionary leaflet prescribed by Order of the Secretary of State.

5. No operation to which this Regulation applies shall be carried out—

- (a) except by a machinery attendant authorised as aforesaid to carry out the operation,

- (b) unless every person carrying out the operation is wearing a close-fitting single-piece overall suit in good repair which (i) is fastened by means having no exposed loose ends and (ii) has no external pockets other than a hip pocket,
- (c) unless another person instructed as to the steps to be taken in case of emergency is immediately available within sight or hearing of a person carrying out the operation, and
- (d) unless such steps as may be necessary, including where appropriate and reasonably practicable the erection of a barrier, are taken to prevent any person, other than a person carrying out the operation, from being in a position where he is exposed to risk of injury from the machinery.

Paragraph (a) of this Regulation shall not prevent the carrying out of such an operation on a special occasion by a competent male person who has attained the age of eighteen if he has been previously authorised in writing for the purposes of that occasion by the occupier or manager of the factory or other person holding a responsible position of management in the factory.

6. Without prejudice to any other obligation to fence machinery, every set-screw, bolt or key on any revolving shaft, spindle, wheel, or pinion, and all spur and other toothed or friction gearing in motion, with which a person carrying out an operation to which this Regulation applies would otherwise be liable to come into contact, shall be securely fenced to prevent such contact unless it is necessarily being examined, lubricated or adjusted while in motion or is necessarily exposed for examination or for any lubrication or adjustment shown by such examination to be immediately necessary.

7. Any ladder in use for the carrying out of an operation to which this Regulation applies shall be securely fixed or lashed or be firmly held by a second person.

*Part II (Regulations 8-11)*  
(Does not apply to printing)

*Part III (Regulations 12-15)*

12. Every machinery attendant or other person, when carrying out an operation to which any of these regulations apply, shall -

- (a) wear the overall required under paragraph (b) of Regulation 5 in such a manner as to cover completely all loose ends of other clothing, and
- (b) make proper use of any appliances provided for the safe carrying out of any such operation.

13. If the Chief Inspector of Factories is satisfied, as respects any factory or any parts of machinery, that owing to special methods of work or other special circumstances the application of any of the requirements or conditions in Regulations 5, 6, 10 and 11 of these Regulations would be unreasonable or inappropriate, he may by certificate in writing authorise such relaxation or variation of that requirement or condition and for such period as he may think fit.

14. The Chief Inspector may at any time at his discretion revoke or vary any certificate given in pursuance of Regulation 10 or Regulation 13 of these Regulations.

15. These Regulations may be cited as the Operations at Unfenced Machinery Regulations, 1938, and shall come into force on the 1st August, 1938.

**NOTE.** - In a recent case in the Court of Appeal (*Nash v. High Duty Alloys Ltd.* ([1947] 1 All E.R., page 363)) two points of importance under Sections 15 and 16 of the Factories Act were dealt with. A dangerous machine had a proper guard and this should have been constantly maintained. Tucker,

L. J., noted that, when the accident referred to in the pleadings happened, the guard was not in position though the machinery was in motion. A question at issue was whether the machinery was *necessarily* exposed. The process of tool-setting required the removal of dies, their adjustment and replacement. 'That does not require the parts to be in motion. No doubt it is usual to follow that process by a test to see whether the operation has been successful and it may be customary to regard that as part of the operation, but, in fact, it is the ordinary working of the machine which could be done with the guard down.'

The second point referred to in this case was that 'machinery attendants', who alone may work on machines while necessarily exposed, must be registered and issued with certificates of their appointment. 'This is not a mere technicality because these stringent regulations are intended to provide for the safety of men who are obliged to work on dangerous machines with the guard up.'

## STATUTORY RULES AND ORDERS

1939 No. 1888

THE FACTORIES (SEPARATION FOR CERTAIN PURPOSES) REGULATIONS, 1939, DATED  
DECEMBER 21, 1939, MADE BY THE SECRETARY OF STATE UNDER SECTION 151 (8)  
OF THE FACTORIES ACT, 1937 (1 EDW. 8 & 1 GEO. 6. C. 67).

In pursuance of the powers conferred upon me by subsection (8) of Section 151 of the Factories Act, 1937, and of all other powers enabling me in that behalf, I hereby make the following regulations:

1. For the purposes of the provisions in Part VI of the Act or in any regulations made thereunder requiring that the period of employment shall be the same for all women and young persons employed in the factory or for all women or for all young persons or for all women or young persons of any description employed in the factory, different branches or departments of work carried on in the same factory may, subject to Regulations 3 to 8 of these Regulations, be deemed to be different factories, if the occupier has obtained from the Inspector for the district, and holds, a certificate that having regard to the character of the respective classes of work carried on in the respective branches or departments, or to the transport facilities for the persons employed, or to other special circumstances of the case, the branches or departments or groups of branches or departments described in the certificate may be treated as different factories for the purposes of this regulation, and that the arrangements for securing such differentiation are satisfactory.

2. For the purposes of Section 82 of the Act (which makes special provision for factories operating the five-day week) different branches or departments of work carried on in the same factory may, subject to Regulations 3 to 8 of these Regulations, be deemed to be different factories, if the occupier has obtained from the Inspector for the district, and holds, a certificate that the branches or departments or groups of branches or departments described in the certificate are sufficiently distinct in character and may be treated as different factories for the purposes of this Regulation, and that the arrangements for securing such differentiation are satisfactory; and where, in pursuance of this Regulation, Section 82 of the Act is only applied to part of the factory, the periods of employment for that part need not be the same as those for a part where the said section is not applied.

3. Each such branch department or group must be carried on in a separate room or separate rooms or in a part of the factory separated from the remainder of the factory by a partition or distinguished therefrom by a definite line of demarcation.

4. Each such branch department or group must be carried on by separate and distinct women and young persons, that is to say, no woman (not being a woman holding a responsible position of management who is not ordinarily engaged in manual work) or young person who is employed in one such branch department or group may be employed in any other branch department or group.

5. For each such branch department or group there shall be posted a separate notice under Section 72 or Section 97 of the Act specifying the periods of employment and intervals for meals or rest for that branch department or group, and it shall not be necessary to post in the factory a single notice specifying the periods and intervals for the whole factory.

6. If the Inspector for the district in writing so directs, a notice showing the names of the women and young persons employed in each branch department or group shall be kept posted in the factory in such a position as to be conveniently read by them.

7. Any such certificate as aforesaid may be revoked not less than seven days after the Inspector for the District has served upon the occupier a notice in writing of the proposal to revoke the certificate.

8. So long as such certificate as aforesaid is in force there shall be kept posted in the factory, in such characters and in such a position as to be conveniently read by the persons employed, a notice in the form specified in the Schedule to these Regulations.

9. These Regulations may be cited as the Factories (Separation for Certain Purposes) Regulations, 1939.

10. [This section revokes certain earlier Orders respecting the treatment of different branches or departments of work as different factories as regards the period of employment of children, young persons and women.]

#### SCHEDULE REFERRED TO

I hereby give notice that a certificate from the District Inspector of Factories under the above Regulations is now in force enabling certain branches or departments of work in this factory, as indicated below, to be treated separately for the purposes of (the requirements of the Act as to the periods of employment for women and young persons being the same for the whole factory) (or the Special Exception in Section 82 of the Act as to the five-day week).

Insert  
whichever is  
appropriate.

Among the conditions laid down are

- (a) Each such branch or department or group of branches or departments must be carried on by separate and distinct women and young persons, that is to say, no woman (not being a woman holding a responsible position of management who is not ordinarily engaged in manual work) or young person who is employed in one branch department or group may be employed in any other branch department or group.
- (b) If the Inspector for the district in writing so directs, a notice showing the names of the women and young persons employed in each branch department or group shall be kept posted in the factory in such a position as to be conveniently read by them.

(Particulars of branches or departments or groups of branches or departments)

Signature of occupier.....

NOTE. - It will be noted that the foregoing Order deals with separation so far only as regards periods of employment. The matter of separation in relation to overtime is still governed by S.R. & O. 1897. No. 226. There is less latitude in regard to overtime than in regard to periods of employment.

APPENDIX III  
SALE OF GOODS ACT, 1893  
[56 and 57 Vict. Ch. 71]

ARRANGEMENT OF SECTIONS

A.D.

PART I  
FORMATION OF THE CONTRACT

*Contract of Sale*

Section

1. Sale and agreement to sell.
2. Capacity to buy and sell.

*Formalities of Contract*

3. Contract of sale, how made.
4. Contract of sale for ten pounds and upwards.

*Subject matter of Contract*

5. Existing or future goods.
6. Goods which have perished.
7. Goods perishing before sale but after agreement to sell.

*The Price*

8. Ascertainment of price.
9. Agreement to sell at valuation.

*Conditions and Warranties*

10. Stipulations as to time.
11. When condition to be treated as warranty.
12. Implied undertaking as to title, &c.
13. Sale by description.
14. Implied conditions as to quality or fitness.

*Sale by Sample*

15. Sale by sample.

PART II  
EFFECTS OF THE CONTRACT

*Transfer of Property as between Seller and Buyer*

16. Goods must be ascertained.
17. Property passes when intended to pass.
18. Rules for ascertaining intention.
19. Reservation of right of disposal.
20. Risk prima facie passes with property.

*Transfer of Title*

21. Sale by person not the owner.
22. Market overt.
23. Sale under voidable title.
24. Revesting of property in stolen goods on conviction of offender.
25. Seller or buyer in possession after sale.
26. Effect of writs of execution.

## PART III

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## PERFORMANCE OF THE CONTRACT

- 27. Duties of seller and buyer.
- 28. Payment and delivery are concurrent conditions.
- 29. Rules as to delivery.
- 30. Delivery of wrong quantity.
- 31. Instalment deliveries.
- 32. Delivery to Carrier.
- 33. Risk where Goods are delivered at distant place.
- 34. Buyer's right of examining the goods.
- 35. Acceptance.
- 36. Buyer not bound to return rejected goods.
- 37. Liability of buyer for neglecting or refusing delivery of goods.

## PART IV

## RIGHTS OF UNPAID SELLER AGAINST THE GOODS

- 38. Unpaid seller defined.
- 39. Unpaid seller's rights.
- 40. Attachment by seller in Scotland.

*Unpaid Seller's Lien*

- 41. Seller's lien.
- 42. Part delivery.
- 43. Termination of lien.

*Stoppage in Transitu*

- 44. Right of stoppage *in transitu*.
- 45. Duration of transit.
- 46. How stoppage *in transitu* is effected.

*Re-sale by Buyer or Seller*

- 47. Effect of sub-sale or pledge by buyer.
- 48. Sale not generally rescinded by lien or stoppage *in transitu*.

## PART V

## ACTIONS FOR BREACH OF THE CONTRACT

*Remedies of the Seller*

- 49. Action for price.
- 50. Damages for non-acceptance.

*Remedies of the Buyer*

- 51. Damages for non-delivery.
- 52. Specific performance.
- 53. Remedy for breach of warranty.
- 54. Interest and special damages.

PART VI  
SUPPLEMENTARY

A.D. 1895

- 55. Exclusion of implied terms and conditions.
  - 56. Reasonable time a question of fact.
  - 57. Rights and duties under Act enforceable by action.
  - 58. Auction sales.
  - 59. Payment into court in Scotland when breach of warranty alleged.
  - 60. Repeals.
  - 61. Savings.
  - 62. Interpretation of terms.
  - 63. Commencement.
  - 64. Short title.
- SCHEDULE.

*An Act for codifying the Law relating to the Sale of Goods.*

[20th February, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I  
FORMATION OF THE CONTRACT

*Contract of Sale*

1.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

Sale and  
agreement  
to sell.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property:

Capacity to  
buy and sell.

Provided that where necessities are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

*Formalities of Contract*

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Contract of  
sale, how  
made.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

Contract of  
sale for ten  
pounds and  
upwards.



A.D. 1893

- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:
- (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

### *Sale by Sample*

Sale by sample.

15. – (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample –

- (a) There is an implied condition that the bulk shall correspond with the sample in quality:
- (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:
- (c) There is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

## PART II

### EFFECTS OF THE CONTRACT

#### *Transfer of Property as between Seller and Buyer*

Goods must be ascertained.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Property passes when intended to pass.

17. – (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Rules for ascertaining intention.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. – Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. – Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. – Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. – When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer –

- (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

- (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. - (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19. - (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

Reservation  
of right of  
disposal.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. - Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Risk *prima*  
*facie* passes  
with pro-  
perty.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

### *Transfer of Title*

21. - (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Sale by  
person not  
the owner.

(2) Provided also that nothing in this Act shall affect -

- (a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;
- (b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

A.D. 1893  
Market  
overt.

22. - (1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

Sale under  
voidable  
title.

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Revesting  
of property  
in stolen  
goods on  
conviction  
of offender.

24. - (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

Seller or  
buyer in  
possession  
after sale.

25. - (1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term 'mercantile agent' has the same meaning as in the Factors Acts.

Effect of  
writ of  
execution.

26. - (1) A writ of *fiat facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term 'sheriff' includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

## PART III

## PERFORMANCE OF THE CONTRACT

A.D. 1893

27. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Duties of seller and buyer.

28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Payment and delivery are concurrent conditions.

29. - (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

Rules as to delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document or title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30. - (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

Delivery of wrong quantity.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

31. - (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

Instalment deliveries.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

Delivery to  
carrier.

32. - (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Risk where  
goods are  
delivered at  
distant  
place.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

Buyer's  
right of  
examining  
the goods.

34. - (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purposes of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Acceptance.

35. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Buyer not  
bound to  
return  
rejected  
goods.

36. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Liability of  
buyer for  
neglecting  
or refusing  
delivery of  
goods.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods: Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

#### PART IV

##### RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Unpaid  
seller  
defined.

38. - (1) The seller of goods is deemed to be an 'unpaid seller' within the meaning of this Act -

(a) When the whole of the price has not been paid or tendered;

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Part of this Act the term 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39.—(1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

Unpaid seller's rights.

- (a) A lien on the goods or right to retain them for the price while he is in possession of them;
- (b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;
- (c) A right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Attachment by seller in Scotland.

#### *Unpaid Seller's Lien*

41.—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely—

Seller's lien.

- (a) Where the goods have been sold without any stipulation as to credit;
- (b) Where the goods have been sold on credit, but the term of credit has expired.
- (c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Part delivery.

43.—(1) The unpaid seller of goods loses his lien or right of retention thereon—

Termination of lien.

- (a) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) When the buyer or his agent lawfully obtains possession of the goods;
- (c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

#### *Stoppage in Transitu*

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Right of stoppage in transitu.

Duration of transit.

45.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

How stoppage in transitu is effected.

46.—(1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller.

#### *Resale by Buyer or Seller*

Effect of sub-sale or pledge by buyer.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was made by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

Sale not generally rescinded by lien or stoppage in transitu.

48.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* resells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves the right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

## PART V ACTIONS FOR BREACH OF THE CONTRACT

### *Remedies of the Seller*

49.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods. Action for price.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. Damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.

### *Remedies of the Buyer*

51.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. Damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree. Specific performance.



The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

Remedy for  
breach of  
warranty.

53. - (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price; or

(b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

Interest and  
special  
damages.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

## PART VI SUPPLEMENTARY

Exclusion  
of implied  
terms and  
conditions.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Reasonable  
time a ques-  
tion of fact.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

Rights, &c.  
enforceable  
by action.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

Auction  
sales.

58. In the case of a sale by auction -

(1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid.

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:

(4) A sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction. A.D. 1893

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof. Payment into court in Scotland when breach of warranty alleged.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. Repeal.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61. – (1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained. Savings.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62. – (1) In this Act, unless the context or subject matter otherwise requires,– Interpretations of terms.

'Action' includes counterclaim and set off, and in Scotland condescendence and claim and compensation:

'Bailee' in Scotland includes custodier:

'Buyer' means a person who buys or agrees to buy goods:

'Contract of sale' includes an agreement to sell as well as a sale:

'Defendant' includes in Scotland defender, respondent, and claimant in a multiplepounding:

'Delivery' means voluntary transfer of possession from one person to another:

'Document of title to goods' has the same meaning as it has in the Factors Acts:

'Factors Acts' mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same: 52 & 53  
Vict. c. 45.  
53 & 54  
Vict. c. 40.

'Fault' means wrongful act or default:

'Future goods' mean goods to be manufactured or acquired by the seller after the making of the contract of sale:

'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

A.D. 1893

'Lien' in Scotland includes right of retention:

'Plaintiff' includes pursuer, complainer, claimant in a multiplepounding and defendant or defender counterclaiming:

'Property' means the general property in goods, and not merely a special property:

'Quality of goods' includes their state or condition:

'Sale' includes a bargain and sale as well as a sale and delivery:

'Seller' means a person who sells or agrees to sell goods:

'Specific goods' means goods identified and agreed upon at the time a contract of sale is made:

'Warranty' as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a 'deliverable state' within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Commence-  
ment.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

Short title.

64. This Act may be cited as the Sale of Goods Act, 1893.

## SCHEDULE

Section 60.

This schedule is to be read as referring to the revised edition of statutes prepared under the direction of the Statute Law Committee.

## ENACTMENTS REPEALED

Session and Chapter

Title of Act and Extent of Repeal

1 Jac. 1. c. 21	-	-	An Act against brokers. The whole Act.
29 Cha. 2. c. 3	-	-	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen. <sup>1</sup>
9 Geo. 4. c. 14	-	-	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven.
19 & 20 Vict. c. 60	-	-	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four and five.
19 & 20 Vict. c. 97	-	-	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two.

<sup>1</sup> Commonly cited as sections sixteen and seventeen.

APPENDIX IV  
COPYRIGHT ACT, 1911  
[1 and 2 GEO. 5. CH. 46.]

A.D. 1911

ARRANGEMENT OF SECTIONS

PART I  
IMPERIAL COPYRIGHT  
*Rights*

Section

1. Copyright.
2. Infringement of copyright.
3. Term of copyright.
4. Compulsory licences.
5. Ownership of copyright, &c.

*Civil Remedies*

6. Civil remedies for infringement of copyright.
7. Rights of owner against persons possessing or dealing with infringing copies, &c.
8. Exemption of innocent infringer from liability to pay damages, &c.
9. Restriction on remedies in the case of architecture.
10. Limitation of actions.

*Summary Remedies*

11. Penalties for dealing with infringing copies, &c.
12. Appeals to quarter sessions.
13. Extent of provisions as to summary remedies.

*Importation of Copies*

14. Importation of copies.

*Delivery of Books to Libraries*

15. Delivery of copies to British Museum and other libraries.

*Special Provisions as to certain Works.*

16. Works of joint authors.
17. Posthumous works.
18. Provisions as to Government publications.
19. Provisions as to mechanical instruments.
20. Provision as to political speeches.
21. Provisions as to photographs.
22. Provisions as to designs registrable under 7 Edw. 7, c. 29.
23. Works of foreign authors first published in parts of His Majesty's dominions to which Act extends.
24. Existing works.

*Application to British Possessions*

25. Application of Act to British Dominions.
26. Legislative powers of self-governing Dominions.
27. Power of Legislatures of British possessions to pass supplemental legislation.
28. Application to protectorates.

PART II  
INTERNATIONAL COPYRIGHT

29. Power to extend Act to foreign works.
30. Application of Part II to British possessions.

A.D. 1911

## PART III

## SUPPLEMENTAL PROVISIONS

31. Abrogation of common law rights.
32. Provisions as to Orders in Council.
33. Saving of university copyright.
34. Saving of compensation to certain libraries.
35. Interpretation.
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37. Short title and commencement.

## SCHEDULES.

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*An Act to amend and consolidate the Law relating to Copyright.*

[16th December, 1911.]

**B**E it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

## PART I

## IMPERIAL COPYRIGHT

*Rights*

## Copyright.

1.—(1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work, if—

- (a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and
- (b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, *to publish* the work or any substantial part thereof; and shall include the sole right, —

- (a) to produce, reproduce, perform, or publish any translation of the work;
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;
- (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;
- (d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered,

and to authorise any such acts as aforesaid.

(3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but,

for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

2. - (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright: -

Infringement of copyright.

- (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:
  - (ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work:
  - (iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art:
  - (iv) The publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:
  - (v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries:
  - (vi) The reading or recitation in public by one person of any reasonable extract from any published work.
- (2) Copyright in a work shall also be deemed to be infringed by any person who -
- (a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or
  - (b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or
  - (c) by way of trade exhibits in public; or
  - (d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work, without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

3. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death:

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

Compulsory  
licences.

4. If at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit.

Ownership  
of copy-  
right, &c.

5.—(1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

Provided that—

- (a) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright; and
- (b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper magazine, or similar periodical.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent:

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the

assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

### *Civil Remedies*

6.—(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts and otherwise, as are or may be conferred by law for the infringement of a right.

Civil remedies for infringement of copyright.

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the court.

(3) In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—

- (a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work;
- (b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

Rights of owner against persons possessing or dealing with infringing copies, &c.

8. Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

Exemption of innocent infringer from liability to pay damages, &c.



Restriction  
on remedies  
in the case  
of archi-  
tecture.

9.—(1) Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as impose summary penalties, shall not apply in any case to which this section applies.

Limitation  
of actions.

10. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

### *Summary Remedies*

Penalties for  
dealing with  
infringing  
copies, &c.

11.—(1) If any person knowingly—

- (a) makes for sale or hire any infringing copy of a work in which copyright subsists; or
- (b) sells or lets for hire, or by way of trade exposes or offers for sale or hire any infringing copy of any such work; or
- (c) distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or
- (d) by way of trade exhibits in public any infringing copy of any such work; or
- (e) imports for sale or hire into the United Kingdom any infringing copy of any such work:

he shall be guilty of an offence under this Act and be liable on summary conviction to a fine not exceeding forty shillings for every copy dealt with in contravention of this section, but not exceeding fifty pounds in respect of the same transaction; or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

(2) If any person knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be guilty of an offence under this Act, and be liable on summary conviction to a fine not exceeding fifty pounds, or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

(3) The court before which any such proceedings are taken may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the court may think fit.

2 Edw. 7.  
c. 15.  
6 Edw. 7.  
c. 36.

(4) Nothing in this section shall, as respects musical works, affect the provisions of the Musical (Summary Proceedings) Copyright Act, 1902, or the Musical Copyright Act, 1906.

Appeals to  
quarter  
sessions.

12. Any person aggrieved by a summary conviction of an offence under the foregoing provisions of this Act may in England and Ireland appeal to a court of quarter sessions and in Scotland under and in terms of the Summary Jurisdiction (Scotland) Acts.

13. The provisions of this Act with respect to summary remedies shall extend only to the United Kingdom.

Extent of provisions as to summary remedies.

#### *Importation of Copies*

14.—(1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in Section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

Importation of copies.

39 & 40  
Vict. c. 36

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876: Provided that, notwithstanding anything in that Act, the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

(7) This section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

#### *Delivery of Books to Libraries*

15.—(1) The publisher of every book published in the United Kingdom shall, within one month after the publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who shall give a written receipt for it.

Delivery of copies to British Museum and other libraries.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depot in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries,

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namely: the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin, and subject to the provisions of this section the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published.

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales, shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered.

(7) For the purposes of this section, the expression 'book' includes every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto.

#### *Special Provisions as to certain Works*

Works of  
joint  
authors.

16.—(1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where, in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

(3) For the purposes of this Act, 'a work of joint authorship' means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

Posthumous  
works.

17.—(1) In the case of a literary dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who

dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter, and the proviso to section three of this Act shall, in the case of such a work apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be prima facie proof of the copyright being with the owner of the manuscript.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

Provisions  
as to  
Government  
publica-  
tions.

19.—(1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

Provisions  
as to  
mechanical  
instru-  
ments.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves —

- (a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and
- (b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned:

Provided that —

- (i) nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and
- (ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.

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- (3) The rate at which such royalties as aforesaid are to be calculated shall –
- (a) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent.; and
  - (b) in the case of contrivances sold as aforesaid after the expiration of that period, five per cent.

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a halfpenny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing:

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions:

- (a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, shall not apply:
- (b) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten:
- (c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the

work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives:

- (d) The saving contained in this Act of the rights and interests arising from, or in connexion with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section:
- (e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed.

(8) Notwithstanding anything in this Act, where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

Provided that—

- (i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright; and
- (ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

20. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

Provision as to political speeches.

21. The term for which copyright shall subsist in photographs shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

Provisions as to photographs.

22.—(1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

Provisions as to designs registrable under 7 Edw. 7 c. 29.

(2) General rules under Section eighty-six of the Patents and Designs Acts, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

23. If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign

Works of foreign authors first published in parts of His Majesty's dominions to which Act extends.

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country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works.

Existing works.

24.—(1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder:

Provided that —

- (a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before that date at which the right would so have expired was the owner of the right or interest shall be entitled at his option either —

- (i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or

- (ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found, advertised in the *London Gazette* and in two London newspapers:

- (b) where any person has, before the twenty-sixth day of July nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connexion with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression 'author' includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of Section nineteen subsections (7) and (8) and of Section thirty-three of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with, the provisions of this section.

*Application to British Possessions*

25.—(1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

Application of Act to British dominions.

(2) If the Secretary of State certifies by notice published in the *London Gazette* that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

26.—(1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature or a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

Legislative powers of self-governing dominions.

(2) In any self-governing dominion to which this Act does not extend, the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act



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extends, may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this subsection, authorised to confer within other parts of His Majesty's dominions.

For the purposes of this subsection, the expression 'a dominion to which this Act extends' includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

Power of  
Legislatures  
of British  
possessions  
to pass sup-  
plemental  
legislation.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

Application  
to protec-  
torates.

28. His Majesty may, by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends.

## PART II

### INTERNATIONAL COPYRIGHT

Power to ex-  
tend Act  
to foreign  
works.

29.—(1) His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

- (a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;
- (b) to literary, dramatic, musical and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;
- (c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends;

and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly:

Provided that—

- (i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I of this Act.
- (ii) the Order in Council may provide that the term of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;
- (iii) the provisions of this Act as to the delivery of copies of books shall not apply to works first published in such country, except so far as is provided by the Order;
- (iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order;

(v) in applying the provision of this Act as to ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country;

(vi) in applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of Section five of the International Copyright Act, 1886.

49 & 50  
Vict. c. 33

(2) An Order in Council under this section may extend to all the several countries named or described therein.

30.—(1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possession specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.

Application  
of Part II  
to British  
possessions.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like orders as under this Part of this Act. His Majesty in Council is authorised to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any order any part of his dominions not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such Order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

### PART III

#### SUPPLEMENTAL PROVISIONS

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

Abrogation  
of common  
law rights.

32.—(1) His Majesty in Council may make Orders for altering, revoking, or varying any Order in Council made under this Act, or under any enactments repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

Provisions  
as to Orders  
in Council.

(2) Every Order in Council made under this Act shall be published in the *London Gazette* and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

33. Nothing in this Act shall deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act.

Saving of  
university  
copyright.  
15 Geo. 3  
c. 53.

34. There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as compensation to a library for the loss of the right to receive gratuitous copies of books.

Saving of  
compensa-  
tion to  
certain  
libraries.

A.D. 1911

Provided that this compensation shall not be paid to a library in any year, unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

Interpreta-  
tion.

35.—(1) In this Act, unless the context otherwise requires,—

- (1) 'Literary work' includes maps, charts, plans, tables, and compilations;
  - (2) 'Dramatic work' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;
  - (3) 'Artistic work' includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;
  - (4) 'Work of sculpture' includes casts and models;
  - (5) 'Architectural work of art' means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction;
  - (6) 'Engravings' include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs;
  - (7) 'Photograph' includes photo-lithograph and any work produced by any process analogous to photography;
  - (8) 'Cinematograph' includes any work produced by any process analogous to cinematography;
  - (9) 'Collective work' means—
    - (a) an encyclopædia, dictionary, year book, or similar work;
    - (b) a newspaper, review, magazine, or similar periodical; and
    - (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;
  - (10) 'Infringing', when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act;
  - (11) 'Performance' means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument;
  - (12) 'Delivery', in relation to a lecture, includes delivery by means of any mechanical instrument;
  - (13) 'Plate' includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are or are intended to be made;
  - (14) 'Lecture' includes address, speech, and sermon;
  - (15) 'Self-governing dominion' means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.
- (2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or performed in public, and a

lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators or assigns.

(3) For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was, during any substantial part of that period, a British subject or a resident within the parts of His Majesty's dominions to which this Act extends.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in the parts of His Majesty's dominions to which this Act extends if he is domiciled within any such part.

36. Subject to the provisions of this Act, the enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule: Repeal.

Provided that this repeal shall not take effect in any part of His Majesty's dominions until this Act comes into operation in that part.

37.—(1) This Act may be cited as the Copyright Act, 1911.

(2) This Act shall come into operation —

- (a) in the United Kingdom, on the first day of July, nineteen hundred and twelve, or such earlier date as may be fixed by Order in Council;
- (b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion;
- (c) in the Channel Islands, at such date as may be fixed by the States of those islands respectively;
- (d) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the Governor.

Short title  
and com-  
mencement

## SCHEDULES

Section 24.

## FIRST SCHEDULE

## EXISTING RIGHTS

Existing Right	Substituted Right
<i>(a) In the case of Works other than Dramatic and Musical Works</i>	
Copyright .. .. .	Copyright as defined by this Act. <sup>1</sup>
<i>(b) In the case of Musical and Dramatic Works</i>	
Both copyright and performing right ..	Copyright as defined by this Act. <sup>1</sup>
Copyright, but not performing right ..	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right, but not copyright ..	The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act.

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings:

'Copyright', in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work.

'Performing right', in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

<sup>1</sup> In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under Section eighteen of the Copyright Act, 1842.

## SECOND SCHEDULE

## ENACTMENTS REPEALED

Session and Chapter	Short Title	Extent of Repeal
8 Geo. 2. c. 13	The Engraving Copyright Act, 1734	The whole Act
7 Geo. 3. c. 38	The Engraving Copyright Act, 1767	The whole Act
15 Geo. 3. c. 53	The Copyright Act, 1775	The whole Act
17 Geo. 3. c. 57	The Prints Copyright Act, 1777	The whole Act
54 Geo. 3. c. 56	The Sculpture Copyright Act, 1814	The whole Act
3 & 4 Will. 4. c. 15	The Dramatic Copyright Act, 1833	The whole Act
5 & 6 Will. 4. c. 65	The Lectures Copyright Act, 1835	The whole Act
6 & 7 Will. 4. c. 59	The Prints and Engravings Copyright (Ireland) Act, 1836	The whole Act
6 & 7 Will. 4. c. 110	The Copyright Act, 1836	The whole Act
5 & 6 Vict. c. 45	The Copyright Act, 1842	The whole Act
7 & 8 Vict. c. 12	The International Copyright Act, 1844	The whole Act
10 & 11 Vict. c. 95	The Colonial Copyright Act, 1847	The whole Act
15 & 16 Vict. c. 12	The International Copyright Act, 1852	The whole Act
25 & 26 Vict. c. 68	The Fine Arts Copyright Act, 1862	Sections one to six. In section eight the words 'and pursuant to any Act for the protection of copyright engravings', and 'and in any such Act as aforesaid'. Sections nine to twelve.
38 & 39 Vict. c. 12	The International Copyright Act, 1875	The whole Act
39 & 40 Vict. c. 36	The Customs Consolidation Act, 1876	Section forty-two, from 'Books wherein' to 'such copyright will expire'. Sections forty-four, forty-five, and one hundred and fifty-two.
45 & 46 Vict. c. 40	The Copyright (Musical Compositions) Act, 1882	The whole Act
49 & 50 Vict. c. 33	The International Copyright Act, 1886	The whole Act
51 & 52 Vict. c. 17	The Copyright (Musical Compositions) Act, 1888	The whole Act

SECOND SCHEDULE—*Contd.*

Session and Chapter	Short Title	Extent of Repeal
52 & 53 Vict. c. 42	The Revenue Act, 1889	Section one, from 'Books first published' to 'as provided in that section'.
6 Edw. 7. c. 36	The Musical Copyright Act, 1906	In section three the words 'and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration may be effected notwithstanding anything in the International Copyright Act, 1886'

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